EDITOR'S NOTE

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No. 93-7657

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID LAWSON,

Petitioner,

-v.-

GARY DIXON, Warden,
Central Prison,
Raleigh, North Carolina

Respondent.

Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, David Lawson, a state prisoner under sentence of death, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 26, 1993 denying his appeal from the denial of a petition for writ of habeas corpus in the United States District Court for the Middle District of North Carolina; rehearing was denied by the Court of Appeals on October 26, 1993.

QUESTIONS PRESENTED

1. **Whether A Trial Attorney Is Relieved Of The Duty To Investigate And Develop Available Mental Health Evidence In Mitigation Of The Death Sentence, To-Wit, A Pre-Trial Competency Evaluation Suggesting Serious Mental Health Problems Short Of Incompetence, When His Client Informs Him That He Prefers The Death Sentence Rather Than A Sentence Of Life Imprisonment If The Jury Returns A Guilty Verdict For First Degree Murder?**

2. **Whether This Court Should Resolve A Split Among the Federal Courts Of Appeals And State Courts Regarding The Constitutionality Of A Penalty Phase Jury Instruction Which Requires The Jury To Find And List Mitigating Factors But Which Does Not Explicitly Instruct It To Do So Pursuant To This Court's Decisions In *Mills v. Maryland*, 486 U.S. 367 (1988) And *McKoy v. North Carolina*, 494 U.S. 433 (1990)?**

3a. **Whether A Defendant Who Requests The Death Penalty Thereby Waives His Sixth Amendment Right To Effective Assistance Of Counsel At The Penalty Phase Of His Trial And His Eighth Amendment Right To Heightened Reliability In The Determination That Death Is The Appropriate Punishment In A Given Case?**

3b. **If So, Must Such A Waiver Be Knowing And Intelligent?**

3c. **Whether The Court Of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim That He Did Not Knowingly And Intelligently Waive His Sixth and Eighth Amendment Rights By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That Petitioner Show Clear And Convincing Evidence, Both Positive And Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

4a. **Whether The Court of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim Of Ineffective Assistance Of Counsel For Failure To Investigate, Develop, And Present Available Mental Health Evidence In Mitigation Of The Sentence Of Death?**

4b. **Did The Court Err By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That The Petitioner Show Clear and Convincing Evidence, Both Positive and Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

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OPINION BELOW

The opinion of the United States Court of Appeals is published at 3 F.3d 743 (4th Cir. 1993) and is reproduced in Appendix "A" of this petition.

JURISDICTION

Rehearing from the judgment of the United States Court of Appeals for the Fourth Circuit was denied on October 26, 1993. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

At issue in this case is the Sixth Amendment to the United States Constitution, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI. Also at issue in this case is the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII. Additionally, the Fourteenth Amendment to the United States Constitution is implicated, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

Statutory provisions are also implicated in this case, including 21 U.S.C. § 848(q)(4)(B), which states, in pertinent part,

> In any post-conviction proceeding under §2254 with issues relating to guilt or sentence, any defendant who is or becomes financially unable to obtain . . . investigative, expert, or other reasonably necessary services shall be entitled to the . . . furnishing of such . . . services.

Also implicated is 21 U.S.C. § 848(q)(9), which provides:

> Upon a finding in *ex parte* proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services . . . .

Finally, 28 U.S.C. § 2254 is also implicated, and it provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . .

28 U.S.C. § 2254.

STATEMENT OF THE CASE

In March, 1981, the Cabarrus County grand jury returned true bills of indictment on Lawson for first degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and felonious breaking or entering. Lawson was tried on pleas of not guilty at the June, 1981 session of Cabarrus County Superior Court. He was represented at trial by James C. Johnson and Frank Plummer, and was convicted of all charges. On June 6, 1981, following a binding jury recommendation that the sentence be death, the trial court imposed the death sentence.

The Supreme Court of North Carolina affirmed his convictions and death sentence on May 21, 1984. *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984). Lawson subsequently petitioned this Court for certiorari, which was denied on May 20, 1985. *Lawson v. North Carolina*, 471 U.S. 1120 (1985).

Thereafter, on February 11, 1986, Lawson filed a Motion for Appropriate Relief in the Superior Court of Cabarrus County, the standard post-conviction collateral relief pleading under North Carolina law. Lawson twice amended his Motion for Appropriate Relief prior to the conduct of an evidentiary hearing. On May 26, 1987, an evidentiary hearing was held in the Superior Court of Cabarrus County, and on July 1, 1987, the Motion

for Appropriate Relief, as amended, was denied. Lawson sought certiorari from the North Carolina Supreme Court and this Court; each was denied, on April 6, 1988 and April 20, 1988, respectively.

On April 14, 1988, petitioner filed an application for a stay of execution with the United States District Court for the Middle District of North Carolina. A stay order was entered and thereafter post-conviction counsel, Mr. Harry H. Harkins, Jr. of Durham, North Carolina, sought the assistance of the North Carolina Resource Center in preparing and litigating a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The Resource Center filed a motion with the District Court for an extension of time within which to file the petition for writ of habeas corpus, and this motion was granted.

On July 12, 1988, Lawson filed a petition for writ of habeas corpus in the District Court. Lawson acknowledged that many of the claims raised in the petition had not previously been presented to the state courts, and contemporaneously filed a second Motion for Appropriate Relief in the Superior Court of Cabarrus County, raising those claims of federal constitutional dimension which were included in the federal habeas petition but which had not previously been presented to the state courts. Lawson moved the District Court to hold the federal petition in abeyance pending the outcome of the second Motion for Appropriate Relief; the State objected to this motion. On August 18, 1988, the United States Magistrate Judge recommended that the motion to hold the federal proceedings in abeyance be denied, that the petition be dismissed as a "mixed" petition under *Rose v. Lundy*, 455 U.S. 509 (1982), and that the stay of execution entered by the District Court be dissolved effective thirty days following the dismissal. Both parties timely filed objections

to the Findings and Recommendations of the United States Magistrate Judge. Nevertheless, on September 2, 1988, the District Court followed the Magistrate Judge's Findings and Recommendations.

The State filed a motion to alter or amend judgment and for relief from judgment, pursuant to Rules 59(e), 60(b), Fed. R. Civ. P. on September 9, 1988. In its motion, the State suggested that it would waive the exhaustion requirement. Thereafter, on September 14, 1988, the District Court telephonically sought a clarification from the State as to whether its waiver of exhaustion was unconditional. On September 14, 1988, the State filed a Clarification of its Motion to Alter or Amend Judgment in which it unconditionally waived exhaustion of the claims of federal constitutional dimension which Lawson had not previously presented to the state courts. Following this clarification, the District Court, on September 21, 1988, noting that the State unconditionally waived exhaustion of state remedies, granted the State's motion to alter or amend judgment, vacated its judgment of September 2, 1988 insofar as it dismissed the habeas petition, and ordered the State of North Carolina to answer Lawson's habeas petition within 40 days. Two days later, on September 23, 1988, Lawson filed notice withdrawing his Motion for Appropriate Relief in the Superior Court of Cabarrus County, premised on the State's waiver of exhaustion and the District Court's vacation of its September 2, 1988 order dismissing the habeas petition for failure to exhaust State remedies.

Subsequent to the filing of the State's Answer and Motion to Dismiss, Lawson filed, *ex parte*, a motion for funds for the appointment of an expert psychiatrist. Attached to this motion was an affidavit of Billy Royal, M.D. who had conducted a preliminary evaluation

of Lawson. Dr. Royal had reviewed Lawson's mental health records from a brief hospitalization for a competency evaluation at Dorothea Dix Hospital, a state mental hospital, prior to Lawson's trial. On April 4, 1989, a hearing was held, ostensibly as a status hearing to determine the further progress of the litigation on the petition. At the hearing, the United States Magistrate Judge provided the State with a copy of Lawson's motion and Dr. Royal's affidavit. The State moved to dismiss, arguing that the proffer of expert testimony to support Lawson's several claims related to his mental health contained in the habeas corpus petition so altered the petition as to present new claims. The State asserted the defense of non-exhaustion of available state remedies. The United States Magistrate Judge required Lawson to brief and identify those issues on which he sought an evidentiary hearing.

Shortly thereafter, Lawson sought a stay of the federal proceedings in order to return to the state courts to re-exhaust his claim that the penalty phase instructions would have been understood by the jury to require unanimity before finding any mitigating circumstances, in light of the decision of this Court in *McKoy v. North Carolina*, 494 U.S. 433 (1990). A stay of the proceedings was granted. Following the denial to Lawson of relief in the state courts, the federal litigation on the petition was re-activated. The State moved to amend its answer to include the defense of non-retroactivity, and the amendment was allowed. Thereafter, further briefing on procedural defenses was ordered by the District Court. The District Court also expanded the record to include the complete files on Lawson from Dorothea Dix Hospital, and on November 19, 1991, the United States Magistrate

Judge issued an Order and Recommendation denying the motion for appointment of an expert psychiatrist, denying an evidentiary hearing, and dismissing the petition.

Both parties filed objections to the Order and Recommendations, and on January 7, 1992, the District Court entered judgment dismissing the petition. Lawson moved to alter or amend judgment on January 23, 1992, and on February 26, 1992 the District Court denied the motion. On March 19, 1992, Lawson filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), based on the United States Court of Appeals decision in *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992). Notice of appeal was filed on March 27, 1992, and after the District Court denied the motion for relief from judgment on March 31, 1992, another notice of appeal was filed on April 7, 1992. The two appeals were consolidated for briefing and argument.

On July 20, 1992, Lawson filed his brief in the United States Court of Appeals for the Fourth Circuit; on August 24, 1992, the State filed its brief in response. The case was argued orally in the Court of Appeals on December 3, 1992, and on August 26, 1993 the Court of Appeals decided the case. Rehearing was denied on October 26, 1993.

STATEMENT OF THE FACTS

On December 4, 1980, Wayne Shinn was murdered during a break-in of his home. His father, Buren Shinn, was also shot; the elder Shinn survived without serious permanent physical injury. David Lawson was arrested for the offenses on December 31, 1980, and was subsequently indicted on charges of first degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and felonious breaking or entering. At trial, the key State's witnesses were Buren Shinn, who identified Lawson as his assailant and described the murder of his son and the assault on himself, and Phyllis Soden, who shared a residence with Lawson and who testified to numerous inculpatory statements Lawson made to her regarding the offense. The defense put on no evidence, and the jury returned guilty verdicts on all charges. At the penalty phase of the case, the State presented no additional evidence. The only defense witness was Lawson himself. Lawson testified that his only prior convictions were two breaking and entering charges. Lawson also testified that he had previously provided truthful testimony in the prosecution of another felony, establishing a statutory mitigating circumstance. Finally, Lawson requested that the jury give him the death penalty, as life imprisonment is cruel and inhumane.

The jury found two statutory aggravating circumstances, at least one mitigating circumstance and, concluding that the aggravating factors outweighed the mitigating factors and that the aggravators were sufficiently substantial to call for imposition of the death penalty, recommended that David Lawson be sentenced to death.

During state post-conviction proceedings, Lawson alleged that trial and appellate counsel were ineffective for a variety of reasons, but did not allege ineffective assistance for

failing to investigate or develop mental health evidence in mitigation. *See Lawson v. Dixon*, 3 F.3d 743, 747, n.1 and accompanying text. In response to the allegations of ineffective assistance, trial and appellate counsel, James C. Johnson, provided the Superior Court of Cabarrus County with an audiotape, played during the evidentiary hearing in state post-conviction proceedings, of a lengthy conversation he had with Lawson during which, *inter alia*, Lawson explained his reasons for wishing to receive the death penalty rather than a sentence of life imprisonment if convicted of first degree murder.

In the federal habeas corpus petition, Lawson alleged several claims relating to mental health, including that Lawson's trial counsel had not provided effective representation by failing to investigate and develop available mental health evidence in mitigation, that Lawson was not competent to proceed to sentencing, that Lawson was not competent to waive known constitutional rights, and that Lawson did not knowingly and intelligently waive known constitutional rights. In its Answer, the State conceded that these claims had never been presented to the state courts but, as noted above, the State unconditionally waived the exhaustion requirement for federal review. Answer to Petition for Writ of Habeas Corpus, *Lawson v. Dixon*, No. C-88-738-S (filed M.D.N.C. October 31, 1988) at 3-5.

Subsequent to the State filing its answer to the petition, Lawson filed, pursuant to 21 U.S.C. §848(q)(4)(B), a motion for funds with which to retain an expert mental health professional for purposes of proving the mental health claims contained in the federal petition. Lawson was and remains indigent and was litigating his §2254 proceeding *in forma pauperis*. In support of his motion, Lawson appended the affidavit of a psychiatrist, Dr. Billy Royal, who had conducted a preliminary evaluation of Lawson, reviewed the records of

Lawson's hospitalization at Dorothea Dix Hospital (a state mental hospital to which Lawson had been briefly referred as an in-patient for a competency evaluation prior to his trial), and made preliminary findings that supported Lawson's claims in the petition and that warranted further evaluation for the presence of mental health mitigators which would have been present at the time of the trial.

At a status conference held on April 4, 1989, the United States Magistrate Judge to whom the case had been assigned by the District Court provided the State with a copy of Lawson's motion and the affidavit of Dr. Royal in support thereof. The stated purpose of providing these materials to the State was to give the State an opportunity to respond to what it might argue was a "new claim" not presented in the habeas petition, since the habeas petition alleged facts supporting claims of constitutional error relating to Lawson's mental health, but did not allege that a mental health professional would support the allegations. As expected, the State asserted that the use of mental health testimony would render the claims related to Lawson's mental health as alleged in the habeas petition so different as to present new claims to which the exhaustion requirement had not been waived and which had not previously been presented to the state courts; therefore, the State moved to dismiss the entire petition as "mixed" under *Rose v. Lundy*.

Thereafter, the United States Magistrate Judge expanded the record to include Lawson's entire records file from his brief hospitalization at Dorothea Dix Hospital. The ultimate diagnosis of the Dix Hospital psychiatrist was that Lawson was competent to proceed to trial, but the records noted a number of serious mental health problems. First, the pre-trial order of the Superior Court of Cabarrus County authorizing the

competency evaluation, which was contained in the Dix Hospital file, made findings of fact to support Lawson's transfer to the hospital. Among those findings of fact were that Lawson's original trial counsel who sought the evaluation "found the Defendant to be in such a mental state that the Defendant cannot adequately assist defense counsel with the preparation of the Defendant's defense." The Superior Court further found that petitioner exhibited an "inability to communicate with his attorney, depression, lapse of memory, anxiety, and a general lack of ability to understand the nature and seriousness of the charges against him." Also, the Dix Hospital records documented that "the client complained of having been depressed all his life," of having recent thoughts of suicide, of having attempted suicide five years earlier, of having trouble with his nerves, and of having received medication and treatment from a mental health center as a child. They also noted that Lawson "thinks that someone is talking to him," and the psychiatrist who gave the ultimate diagnosis that Lawson was competent to proceed to trial, Dr. Groce, noted that there was a suggestion of

> significant psychopathology including a low self-esteem with feelings of inferiority, insecurity and inadequacy. Mr. Lawson's MMPI profile suggest (sic) anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by a tendency to be self-dramatic. He may be expected to be chronically hostile and resentful and to use projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient. Expression of hostility and depression often form a cyclic pattern.

As is readily apparent, there was an abundance of evidence from the records of Dorothea Dix Hospital available prior to and at the time of trial suggesting that David Lawson had a history of mental health problems that could have been investigated and developed for use

at either the guilt or penalty phase of Lawson's trial, and this evidence was a part of the record considered by the federal habeas court.

In addition, the federal habeas court had for its consideration the affidavit of Dr. Billy Royal provided by the petitioner in support of his motion for funds. In Dr. Royal's affidavit, he opines that

> David [Lawson] has a very poor self-image and low self esteem which results in self-destructive behavior. The history indicates that this is a chronic behavior pattern, and results from being reared during his early formative years in a family of disturbed and chaotic relationships. Rejection and disappointment in efforts to develop close familial relationships are noted. Mr. Lawson's natural parents separated when he was approximately two years old. A major basis for this was the alcohol abuse and gambling addiction of his father. He lived with his maternal grandparents for about two years and then rejoined his mother at about age four when she remarried. The stepfather also abused alcohol. A stormy marital relationship was evident and a poor and hostile parent/child relationship was experienced. Early childhood memories are predominantly traumatic as well as anxiety- and depression-provoking. Behavioral problems developed as a child and after a period of time in a children's correctional center Mr. Lawson was not welcome back in the home. He has been independent since age fifteen. Attempts to return home or to develop a positive relationship were not accepted by his mother and stepfather. They have now been divorced for several years. Following a short stint in the Marine Corps, Mr. Lawson came to North Carolina to seek out his natural father. A marginal but basically unsatisfying relationship developed. His father had continued his habits of alcohol abuse and gambling obsessions.
>
> Mr. Lawson developed relationships of a limited intensity with both men and women. Fear of closeness, fear of rejection, as well as actual rejection with women was evident, even after a period of closeness. This appeared to follow a pattern similar to the rejection by his mother and resulted in Mr. Lawson developing casual or superficial relationships only. The fathering of a daughter by a relationship with a woman friend was recounted to me both with depression and ambivalence. A

> suicide attempt was made after that relationship terminated. Although platonic relationships with married persons developed, relationships of a mature male/female type were avoided, due primarily to Mr. Lawson's fear of rejection. A macho view of the world developed which in part included the process that you saw life in terms of "white" and "black" and you made definitive decisions as if you were totally in charge. Emotions were subrogated and denied as possible for himself as well as for others. This mental stance made it difficult if not impossible to view the world and options within it in a rational and objective manner as more normal people are able to do. This underlying and overt pathology was related not only to the acts that brought him to trial, but was predominantly involved in his failure to control his behavior and decisions in the trial process; there was a lack of capacity to understand his options in the trial and more particularly in the sentencing phase.
>
> Because of this conflictual underlying and overt pathology, I believe David Lawson was incapable of making voluntary, knowing and intelligent waivers of his rights at the sentencing hearing even if he had been given the factual evidence available and his potential options had been adequately explained to him. I believe that his mental state was such that he could not have incorporated that information and understood it on a rational and objective basis. In my opinion, the internal pathology, including the self-destructive behaviors, the macho image and tendencies, the depression with the emotional turmoil at the time resulted in Mr. Lawson making rather bizarre decisions at the time of the penalty phase.

Affidavit of Dr. Billy Royal, at pp. 4-5.

Finally, one other piece of evidence was before the District Court which shed light on Lawson's mental status – the affidavit of David's mother, Mavis Lawson. In response to the State's motion for summary judgment, Lawson submitted a number of materials, pursuant to Fed. R. Civ. P. 56(e). Among the materials submitted was an affidavit from Mavis Lawson, David's mother. In her affidavit, Mrs. Lawson confirmed much of the personal history David had earlier reported to the Dorothea Dix Hospital personnel and to

Dr. Royal, including that David's parents were separated when David was two years old, that David was left with his maternal grandparents after his parents separated, that David had a difficult adjustment to the separation from his mother ("I remember my mother telling me how for weeks David would sit by the window and stare out looking for me, . . . "), that David returned to live with his mother after she remarried, but that David's stepfather never accepted him and was verbally and psychologically abusive to David. Her affidavit confirmed that David's stepfather had a drinking problem, and would often come home drunk and become abusive.

The United States Magistrate Judge ultimately concluded that Lawson was not entitled to the funds for the appointment of a mental health expert nor to an evidentiary hearing on any of the claims in the petition; therefore, the United States Magistrate Judge recommended summary dismissal of the petition. The United States District Court adopted the Magistrate Judge's Order and Recommendation, including the findings of fact and conclusions of law. Importantly, one of the findings made by the United States Magistrate Judge was that, while the presentation of the affidavit of Dr. Royal modified the claim as presented in the petition so as to render it "new," the State would not be allowed to assert the defense of non-exhaustion of state remedies for four reasons. First, the State had already unconditionally waived the exhaustion requirement; second, the State limited its assertion of the defense to only one of the claims for which Lawson sought to employ expert testimony rather than to all of the claims upon which Lawson sought an evidentiary hearing (amounting, according to the Magistrate Judge, to a "conditional" waiver of exhaustion); third, the State's earlier waiver of exhaustion had prompted Lawson to withdraw his state

post-conviction pleading upon which he would have exhausted the claim at issue; and, fourth, the State would not be unfairly prejudiced and denial of the State's motion "better serves the ends of justice." *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991), Order and Recommendation of the United States Magistrate Judge, at 19.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. **Whether A Trial Attorney Is Relieved Of The Duty To Investigate And Develop Available Mental Health Evidence In Mitigation Of The Death Sentence, To-Wit, A Pre-Trial Competency Evaluation Suggesting Serious Mental Health Problems Short Of Incompetence, When His Client Informs Him That He Prefers The Death Sentence Rather Than A Sentence Of Life Imprisonment If The Jury Returns A Guilty Verdict For First Degree Murder?**

The Court of Appeals never explicitly discussed petitioner's claims of ineffective assistance of counsel in its opinion. It affirmed "the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993). It appears that this includes petitioner's claim of ineffective assistance of trial counsel for failure to investigate and develop available mental health evidence in mitigation of the death sentence. To the extent that it does not, the Court of Appeals must have silently affirmed the federal district court's decision. The Magistrate Judge's Order and Recommendation concluded that insofar as Lawson was competent, trial counsel was under no duty to investigate any mental health evidence not rising to the level of incompetence since his client requested the death sentence. Order and Recommendation at 50 ("Therefore, once a petitioner knowingly makes a decision and is not incompetent, the attorney has an ethical duty to comply with those wishes."), *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991).

2. **Whether This Court Should Resolve A Split Among the Federal Courts Of Appeals And State Courts Regarding The Constitutionality Of A Penalty Phase Jury Instruction Which Requires The Jury To Find And List Mitigating Factors But Which Does Not Explicitly Instruct It To Do So Pursuant To This Court's Decisions In *Mills v. Maryland*, 486 U.S. 367 (1988) And *McKoy v. North Carolina*, 494 U.S. 433 (1990)?**

The Court of Appeals held "that such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993) (citations omitted).

3a. **Whether A Defendant Who Requests The Death Penalty Thereby Waives His Sixth Amendment Right To Effective Assistance Of Counsel At The Penalty Phase Of His Trial And His Eighth Amendment Right To Heightened Reliability In The Determination That Death Is The Appropriate Punishment In A Given Case?**

b. **If So, Must Such A Waiver Be Knowing And Intelligent?**

The Court of Appeals affirmed "the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993). It appears that this includes petitioner's claim that his request to the jury for the death sentence amounted to a waiver of his Sixth and Eighth Amendment rights. To the extent that the Court of Appeals silently affirmed the district court, the Order and Recommendation of the United States Magistrate Judge primarily concluded that petitioner could only challenge his waivers if he were incompetent and, having decided that petitioner did not establish a challenge to his competence, he could not challenge the nature of any supposed waiver. Objections and Recommendation of the United States Magistrate Judge, at pp. 55-57, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991). Secondarily, the Magistrate Judge denied relief based on a tape recorded conversation between petitioner and trial counsel made by trial counsel prior to trial and played as evidence adduced at the state post-conviction hearing at which petitioner explained why he sought the death penalty. Objections and Recommendation of the United

States Magistrate Judge at 58, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991).

3c. **Whether The Court Of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim That He Did Not Knowingly And Intelligently Waive His Sixth and Eighth Amendment Rights By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That Petitioner Show Clear And Convincing Evidence, Both Positive And Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

The Court of Appeals held that petitioner "failed to present clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to his mental capacity. Accordingly, we affirm the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993).

4a. **Whether The Court of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim Of Ineffective Assistance Of Counsel For Failure To Investigate, Develop, And Present Available Mental Health Evidence In Mitigation Of The Sentence Of Death?**

4b. **Did The Court Err By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That The Petitioner Show Clear and Convincing Evidence, Both Positive and Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

In its opinion, the Court of Appeals never explicitly discusses petitioner's claims of ineffective assistance of counsel during the penalty phase for failing to investigate, prepare, or present evidence in mitigation, including mental health mitigation. It affirmed "the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993).

It appears that this includes petitioner's claim of ineffective assistance of trial counsel for failure to investigate and develop available mental health evidence in mitigation of the death sentence. To the extent that it does not, the Court of Appeals must have silently affirmed the federal district court's decision. The Magistrate Judge's Order and Recommendation concluded that insofar as Lawson was competent, trial counsel was under no duty to investigate any mental health evidence not rising to the level of incompetence since his client requested the death sentence. Order and Recommendation at 50 ("Therefore, once a petitioner knowingly makes a decision and is not incompetent, the attorney has an ethical duty to comply with those wishes."), *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991).

REASONS FOR GRANTING THE WRIT

1. **Whether A Trial Attorney Is Relieved Of The Duty To Investigate And Develop Available Mental Health Evidence In Mitigation Of The Death Sentence, To-Wit, A Pre-Trial Competency Evaluation Suggesting Serious Mental Health Problems Short Of Incompetence, When His Client Informs Him That He Prefers The Death Sentence Rather Than A Sentence Of Life Imprisonment If The Jury Returns A Guilty Verdict For First Degree Murder?**

David Lawson has never had an evidentiary hearing in support on his claim of ineffective assistance of counsel at the penalty phase of his capital trial for counsel's failure to investigate, prepare and present available mental health evidence. The claim was not raised in state court, but the State waived the defense of non-exhaustion of state remedies. *Lawson*, 3 F.3d at 748. The District Court found that a North Carolina statute allowing a state post-conviction judge to ignore a defendant's waiver for failing to earlier litigate a

claim when in a position to do so "preclude[d] enforcement of the North Carolina procedural bar unless a state court has actually enforced it as to a particular claim." Order and Recommendation of the United States Magistrate Judge, at 24, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991). Nevertheless, Lawson was never accorded an evidentiary hearing in federal court on this claim.

In affirming the United States District Court for the Middle District of North Carolina, the Court of Appeals for the Fourth Circuit accepted the District Court's conclusion that a defendant who informs his counsel that he prefers the death sentence to the sentence of life imprisonment if convicted of first degree murder relieves the trial attorney of any obligation to investigate, prepare or present any penalty phase evidence in mitigation. No other federal court of appeals has reached a similar conclusion in the face of supported allegations that the defendant had serious mental health problems which impacted his decision to seek the death penalty.

In a case similar to the case at bar in the Fifth Circuit, that court instructed that the defendant's "instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyers' failure to investigate the intoxication defense." *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983), *reh'g denied*, 739 F.2d 187 (1984), *cert. denied*, 469 U.S. 1028 (1984). *Cf. Gray v. Lucas*, 677 F.2d 1086, 1093-94 (5th Cir. 1982), *cert. denied*, 461 U.S. 910 (1983) (a capital defendant's stated desire not to use character witnesses does not negate the counsel's duty to investigate). Although the court ultimately held that the habeas petitioner was not prejudiced thereby, the Fifth Circuit concluded that trial counsel's failure to investigate the intoxication defense fell below an objective standard of reasonableness,

despite his client's directive. In so finding, the court relied on the fact that counsel never discussed the intoxication defense with their client.

The Eighth Circuit has also held that the a capital defendant's directive not to introduce evidence in mitigation does not override counsel's duty to investigate, particularly when evidence of a history of mental health problems is available. *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

The Eleventh Circuit, too, has addressed this situation where a capital defendant with mental health problems has advised counsel not to present mitigating evidence. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986). The Eleventh Circuit's analysis is particularly instructive.

> The reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence in court is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering potential merit. ... An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.

Thompson, 787 F.2d at 1451 (citations omitted). *See also*, *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991) ("The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called."); *Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986) (defendant's statements that 'he did not want to take the stand and did not want anyone to cry for him' did not warrant counsel's failure to investigate available mental health evidence in mitigation).

The Fourth Circuit in the case at bar affirmed the district court's conclusion that "once a petitioner knowingly makes a decision and is not incompetent, the attorney has an

ethical duty to comply with those wishes." Order and Recommendation of the United States Magistrate Judge, at 50, *Lawson v. Dixon*, No. C-88-738-S (November 19, 1991) (citations omitted). The Eleventh Circuit has explicitly held, contrarily, that competence is not the linchpin.

> The district court also rejected the contention that Blanco's mental health mitigating evidence demonstrated ineffectiveness because Blanco did not show that he was incompetent at the time of trial. But there is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.

Blanco, 943 F.2d at 1503, *citing Perri v. State*, 441 So. 2d 606, 609 (Fla. 1983).

The district court below also put great stock in trial counsel's testimony at the state post-conviction hearing (on another issue, not ineffectiveness for failure to develop mental health evidence) that "counsel found that petitioner's mental processes, reasoning and logic were perhaps the best of any client he had represented." Order and Recommendation of the United States Magistrate Judge, *Lawson v. Dixon*, No. C-88-738-S (November 19, 1991) at 40. However, numerous courts have concluded that this is an unreliable method for concluding there is an absence of mental health problems. For example, the Sixth Circuit has said that "the fact that a person is intelligent does not represent proof that he is free from mental illness." *United States v. Tate*, 419 F.2d 131, 132 (6th Cir. 1969). *See also*, *Thompson*, 787 F.2d at 1451 (11th Cir. 1986) (lawyer cannot 'blindly follow' client's instructions especially where his judgment may be impaired by mental difficulties).

In the case at bar, petitioner alleged in federal court that he had been denied the effective assistance of counsel due to counsel's failure to investigate, develop and present available mental health evidence in mitigation of the death sentence. The facts available supporting this allegation included the Discharge Summary from Dorothea Dix Hospital following Lawson's brief hospitalization for a competency evaluation requested by predecessor trial counsel and conducted prior to trial. Lawson argued in the court below that this report would have indicated sufficient mental health problems to have warranted further investigation. That Discharge Summary noted that Lawson had reported previous suicidal thoughts and one attempt, and that "Lawson's projective drawings suggest significant psychopathology . . . ." Additionally, included in the court file at the time that trial counsel undertook the representation of Mr. Lawson was the court order authorizing Lawson's hospitalization at Dorothea Dix Hospital for a competency evaluation. That order contained findings of fact that predecessor trial counsel

> . . .has consulted with the Defendant and found the Defendant to be in such a mental state that the Defendant cannot adequately assist defense counsel with the preparation of the Defendant's defense.
>
> 5. That the Defendant has exhibited the following characteristics in conduct: inability to communicate with his attorney, depression, lapse of memory, anxiety, and a general lack of ability to understand the nature and seriousness of the charges against him.

Order for Mental Evaluation, *State v. Lawson*, 80 CRS 18307 (Cabarrus Co. Super. Ct. January 29, 1981). In spite of this information, trial counsel did not obtain the remaining records from Dorothea Dix Hospital. In a similar situation, the Fifth Circuit has held this to be ineffective assistance of counsel. *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987)

(where counsel makes some exploration of the insanity defense but fails to take an obvious and readily available investigatory step which would have made the defense viable . . . courts may find ineffective assistance of counsel). *See also*, *Bouchillon v. Collins*, 907 F.2d 589, 596 (5th Cir. 1990) (trial counsel "made no phone calls, did not request Bouchillon's medical records, did not talk to witnesses regarding Bouchillon's mental problems -- in short, he did no investigation of any kind because he said that Bouchillon appeared rational."). In *Bouchillon*, the Fifth Circuit summed up counsel's duty by noting "it must be a very rare case indeed where a decision not to investigate would be "reasonable" after counsel has notice of the client's history of mental problems." *Ibid.*

Lawson also alleged prejudice from trial counsel's inexplicable omissions of investigation. Lawson alleged facts about his background which supported his claims of serious mental health problems, including serious depression, and proffered to the district court the affidavit of Dr. Billy Royal, a psychiatrist who was formerly employed by Dorothea Dix Hospital and who indicated that he had conducted over one thousand forensic evaluations. Dr. Royal opined that Lawson suffered serious psychopathology, including depression, which affected his behavior at the time of the offense and at the time he requested the death penalty from the jury. Importantly, Dr. Royal's affidavit, while not attached to the petition for writ of habeas corpus, was alluded to in the petition, so the State was or reasonably should have been aware that petitioner intended to rely on expert mental health testimony in support of his claims. *See* Petition for Writ of Habeas Corpus at 39, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. filed July 13, 1988). In addition, petitioner also proffered the affidavit of Mavis Lawson, his mother, to establish prejudice from counsel's

failure to investigate, develop and present mental health evidence in mitigation. Mrs. Lawson's affidavit corroborated much of the self-reported history contained in Dr. Royal's affidavit, so there could be no serious challenge to the facts underlying Dr. Royal's affidavit. *See, e.g., Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992) (ineffective assistance of counsel in failing to establish factual support for psychiatric testimony through other sources where prosecution effectively challenged factual basis for defense psychiatric evidence by attacking defendant's credibility).

Finally, the case presented here is clearly distinguishable from cases in which the defendant instructs counsel not to pursue an available defense and there is no mental health evidence that would give a reasonable person pause in relying on such an instruction. *See, e.g., Jeffries v. Blodgett*, 988 F.2d 923 (9th Cir. 1993); *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985). In *Mitchell*, mental health evidence was not at issue, and the defendant instructed counsel not to present the testimony of family members in mitigation. In *Jeffries*, counsel had fully investigated the case in mitigation; the question presented there was not ineffectiveness for failure to investigate, but rather ineffective assistance for failure to present available mitigation evidence. Here, there was available evidence suggesting "significant psychopathology" which should have led trial counsel to conduct an investigation into his client's mental health status and to inform his client of the availability of mental health evidence in mitigation. Additionally, given the extent of the mental health evidence such an investigation would have uncovered, that evidence should have been presented to the sentencing jury. Such evidence would have established two statutory mitigating factors under North Carolina law. N.C.G.S. §§15A-2000(f)(2) ("the capital felony was committed

while the defendant was under the influence of mental or emotional disturbance"); (f)(6) ("the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired"). In addition, there would have been non-statutory mitigating factors available for the jury's consideration from the evidence of Lawson's "significant psychopathology." There was clear prejudice from counsel's failures since, under North Carolina law, a defendant can be sentenced to death only upon a unanimous verdict that the aggravating circumstances are sufficiently substantial, when considered together with the mitigating circumstances, to warrant imposition of the death penalty. *See McKoy v. North Carolina*, 494 U.S. 433 (1990). Therefore, "since the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be, [t]here is a reasonable probability that but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different." *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (citations omitted).

2. Whether This Court Should Resolve A Split Among the Federal Courts Of Appeals And State Courts Regarding The Constitutionality Of A Penalty Phase Jury Instruction Which Requires The Jury To Find And List Mitigating Factors But Which Does Not Explicitly Instruct It To Do So Pursuant To This Court's Decisions In *Mills v. Maryland*, 486 U.S. 367 (1988) And *McKoy v. North Carolina*, 494 U.S. 433 (1990)?

At the penalty phase of the trial, petitioner's jury was instructed that the State must prove three things in order to sentence petitioner to death: "that one or more aggravating circumstances existed; that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty; and, third, that the aggravating circumstances found by you are sufficiently substantial to outweigh any

mitigating circumstance or circumstances found by you. If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death." Because one statutory mitigating circumstance was proved by the defendant's testimony and was unrebutted by the State, to-wit, that the defendant testified truthfully on behalf of the prosecution in another prosecution of a felony, N.C.G.S. §15A-2000(f)(8), the trial court, pursuant to North Carolina law, instructed the jury peremptorily to answer "yes" to the question whether one or more mitigating circumstances existed. The court then instructed the jury as to issue four, the weighing of aggravating circumstances against mitigating circumstances. The instructions were that in order to sentence the defendant to death, the jury must "find unanimously beyond a reasonable doubt that the aggravating circumstance or circumstances found by you outweigg [sic] any mitigating circumstance or circumstances found by you."

In instructing the jurors as to particular functions that they were to perform, the trial court routinely used the collective pronoun "you" at least nine times. At no time did the court explain to the jurors that each could independently consider mitigating evidence and employ those individual determinations in the final decision-making process of whether the appropriate sentence should be life or death. Although the jury was never explicitly instructed that it must be unanimous as to its findings on the existence of mitigating factors, such an interpretation is the only reasonable interpretation that can be made of these instructions. This is particularly true in light of the Issues and Recommendation sheet for submitted to the jury for recordation of the answers to the special sentencing inquiries. Under issue three, which asked, "Do you find one or more mitigating circumstances?" the

form left a single blank to answer the question "yes" or "no." The form listed three statutory mitigating circumstances for the jury's consideration on the sheet. The first was whether the defendant "has no significant history of prior criminal activity." N.C.G.S. §15A-2000(f)(1). The second was whether the defendant "testified truthfully on behalf of the prosecution in another prosecution of a felony." N.C.G.S. §15A-2000(f)(8). As noted above, the court instructed the jury peremptorily to answer "yes" to the overarching question of whether it found one or more mitigating factors because of the existence of this mitigating circumstance. Finally, the form listed whether there existed "any other circumstance or circumstances arising from the evidence which you **the jury** deem to have mitigating value." N.C.G.S. §15A-2000(f)(9) (emphasis added). There were a number of non-statutory mitigating factors which the jury could have found and which were supported by evidence developed during the guilt phase of the trial, including the testimony of Phyllis Soden that after she and petitioner had a fight, petitioner came to her to apologize and express his care and concern for her. Ms. Soden testified that she never saw David act violently, and that she thought of the petitioner as a friend. She also testified that when he was a boarder at her house, he was neat and clean, and did things to help take care of the house. Another guilt phase witness, Harley Tucker, testified that he knew petitioner was from a broken home, that his parents were split up, and that petitioner was raised by his mother. Under the instructions received orally and on the Issues sheet, no juror could consider as mitigating these circumstances unless all jurors unanimously found them to be mitigating.

Empirical evidence supports petitioner's common-sense reading of these instructions. In one study, a group of fifty-seven subjects was provided instructions which, as was the case

with the instructions at issue in this case, did not explicitly require unanimity in the consideration of mitigating circumstances. A second group of fifty-eight subjects was provided instructions explicitly requiring unanimity as to mitigating circumstances. After each group "deliberated" about a punishment based on a common set of facts, they were questioned about their deliberations. When asked if the instructions required unanimity as to the consideration of mitigating circumstances, ninety-three percent of the subjects who were not explicitly instructed about how to find mitigating circumstances believed they had to agree unanimously before considering any of those circumstances. J. Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUMAN BEHAV. 203 (1992).

In spite of all this, the Fourth Circuit held that the instructions in this case "does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor." *Lawson*, 3 F.3d at 754, *citing Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991). This language suggests that, while paying lip service to *Mills v. Maryland*, 486 U.S. 367 (1988) (ambiguous jury instructions would be understood by reasonable jury to unconstitutionally require unanimity for the consideration of any mitigating factor), the Fourth Circuit dismissed the claim because there was no **explicit** unanimity requirement. Even if, however, the Fourth Circuit's holding reflected a consideration that these instructions would not reasonably have been understood by the jury in an unconstitutional manner, *see Boyde v. California*, 494 U.S. 370 (1990), that holding would be in conflict with other federal courts of appeals and state courts, and would be in error. *See, e.g., Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (instruction which can

reasonably be understood to require a unanimous verdict to impose a life sentence violates *Mills*); *Kubat v. Thieret*, 867 F.2d 351 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989) (same).

The sentencing verdict form submitted to the jury provided only one blank space for answers to the questions submitted to it, including the question regarding the existence of mitigating circumstances. The Supreme Courts of Wyoming and Georgia considered this fact to be crucial in their holdings that penalty phase forms which provided only one space for an answer as to the existence of mitigating factors created unconstitutional risks that jurors were precluded from the consideration of mitigating factors by a unanimity requirement. *Engberg v. Meyer*, 820 P.2d 70, 93 (Wyo. 1991); *State v. Brantley*, 262 Ga. 786, 427 S.E.2d 758 (1993). In Brantley, the Georgia Supreme Court concluded that "[r]equiring a written finding on mitigating circumstances, signed by the foreperson, implicitly imposed a unanimity requirement on mitigating circumstances." *Id.* at 765. The instructions here, combined with the Issues and Recommendation sheet, make the error even more clear than that in *Brantley*. Given the degree of disagreement among the federal and state courts as to this issue, certiorari is warranted in this case.

There is no retroactivity bar to this Court's consideration of this claim in habeas corpus proceedings. The Fourth Circuit has held that *Mills* and *McKoy* fall within the second exception to the rule prohibiting consideration of new rules in habeas corpus proceedings announced in *Teague v. Lane*, 489 U.S. 288 (1989). *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992). Moreover, the State waived the non-retroactivity defense by failing to assert it until after it had lost on the merits of *McKoy* in this Court. For this reason as well,

the Fourth Circuit held, in *Williams*, the State had waived the defense. *Williams*, 961 F.2d at 457.

3a. Whether A Defendant Who Requests The Death Penalty Thereby Waives His Sixth Amendment Right To Effective Assistance Of Counsel At The Penalty Phase Of His Trial And His Eighth Amendment Right To Heightened Reliability In The Determination That Death Is The Appropriate Punishment In A Given Case?

3b. If So, Must Such A Waiver Be Knowing And Intelligent?

3c. Whether The Court Of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim That He Did Not Knowingly And Intelligently Waive His Sixth and Eighth Amendment Rights By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That Petitioner Show Clear And Convincing Evidence, Both Positive And Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?

In *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017 (1989), the Supreme Court of New Jersey held that even if a defendant asks the jury for the death sentence, trial counsel must nevertheless provide evidence of mitigating circumstances as a matter of federal constitutional law.

> Requiring a jury to consider mitigating evidence is necessary to prevent death sentences that are 'wantonly and freakishly imposed.' Consideration of mitigating circumstances is essential to individualized determinations. Refusal to present mitigating evidence prevents the jury from considering crucial information in making its decision. Without a record concerning mitigating evidence we [the reviewing court] would be unable to fulfill our constitutional and statutory duty to review the proportionality of a defendant's sentence.

State v. Hightower, 120 N.J. 378, 415, 577 A.2d 99, 117 (1990), *citing Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J. concurring). In one recent case in Florida in which a defendant refused to cooperate with his counsel regarding the presentation of mitigating

evidence, the trial court appointed special counsel to prepare and present mitigating evidence to represent the public interest in bring forth mitigating factors to be considered by the court in the sentencing proceeding. *State v. Klokoc*, 589 So.2d 219 (Fla. 1991). On appeal, appointed counsel was ordered by the Florida Supreme Court to proceed as diligent appellate counsel in spite of his client's wishes. *Klokoc*, 589 So.2d at 222 ("Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.")

The Florida Supreme Court has been unwilling to extend the holding in *Klokoc*, see, *e.g.*, *Hamblen v. State*, 527 So.2d 800 (Fla. 1988) (Hamblen made a knowing, intelligent and voluntary waiver of his right to counsel and represented himself and decided himself to not submit any evidence in mitigation of the death sentence). Nevertheless, that court, and others, require that waivers be knowing, intelligent and voluntary. *Id.* Similarly, Georgia has required that where the defendant seeks the death penalty, there must be a knowing, intelligent and voluntary waiver of Sixth and Eighth Amendment rights. *Morrison v. State*, 373 S.E.2d 506, 509 (Ga. 1988) ("Where a properly-informed, competent defendant insists that he prefers a death sentence to life imprisonment, his attorney does not violate any right of the defendant by attempting to comply with his client's wishes.") (citations omitted). However, the Georgia Supreme Court made clear that the inquiry went beyond the attorney's duty.

> However, although the defendant may have a right to present his personal desires to the court, those desires are not controlling. As the trial court recognized, its responsibilities are much broader than the defendant's own wishes, and the imposition of a death sentence would be authorized only when, as here, the court has satisfied itself (1) that the existence of at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, and (2) considering all the facts and circumstances presented to the court, the death sentence is the appropriate punishment.

Morrison, 373 S.E.2d at 509. The court did not stop there, however, opining in dicta that "the trial court in a case like this may have an obligation to conduct an independent investigation into the possible existence of evidence in mitigation." *Ibid.* In *Morrison*, the trial court called as court experts two psychiatrists who had evaluated Morrison, as well as an investigator from Tennessee regarding Morrison's cooperation with the Tennessee authorities when he was arrested. *Ibid.* While the Ninth Circuit has likewise refused to hold that no waiver can be made, it too has suggested, in dicta, that such a waiver must be made knowingly and intelligently. *Jeffries v. Blodgett*, 988 F.2d 923, 940 (9th Cir. 1993).

In the instant case, of course, petitioner was disallowed from putting on evidence establishing that petitioner was either not competent to make, nor, alternatively, made a knowing, intelligent and voluntary waiver. *Lawson*, 3 F.3d at 754. The Fourth Circuit held that in order for Lawson to be entitled to an evidentiary hearing on his claim that he either was not competent to waive his constitutional rights, nor did he do so knowingly, intelligently and voluntarily, he was required to show, by clear and convincing evidence of positive and unequivocal facts generating a substantial and legitimate doubt as to his mental competency. *Ibid.* No other court has held a petitioner to that standard. *See, e.g., Smith v. Kemp*, 664 F.Supp. 500 (M.D.Ga. 1987), *aff'd by equally divided court sub. nom. Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (*en banc*). For clarity, petitioner clearly concedes that his claim below that the standard for competence to waive known constitutional rights is different from the *Dusky* standard is foreclosed by this Court's recent decision in *Godinez*

v. Moran, 509 U.S. ___, ___ S.Ct. ___, 124 L.Ed.2d ___ (1993) (competence to stand trial is the same as competence to plead guilty or to waive counsel; does not deprecate other requirement that waivers be knowing and intelligent), and he does not assert it here.

He does, however, assert that he had a right to present evidence in federal court to establish that he did not knowingly and intelligently waive his rights to counsel and to a reliable sentencing determination, as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Lawson alleged in his habeas petition that he waived those rights by his instruction to counsel not to present mitigating evidence and his request to the jury to be sentenced to death. He further alleged such waiver was not knowing and intelligent. He supported these allegations by proffering that trial counsel materially misinformed him of his parole eligibility if he were sentenced to life imprisonment and by proffering the affidavit of Billy Royal, M.D., who opined that Lawson's psychopathology deprived him of the ability to make a knowing and intelligent waiver of his rights. This evidence would, if proved, entitle petitioner to relief. Since this claim was not presented to the state courts, the State waived the exhaustion requirement, and the court below held that North Carolina's permissive procedural default rule precluded it from holding the claim defaulted, petitioner was entitled to an evidentiary hearing in district court. *Townsend v. Sain*, 372 U.S. 293 (1963). This Court's recent decision holding that where a petitioner has failed to develop facts in state court, he must show cause and prejudice for the failure in order to be entitled to an evidentiary hearing in federal court, *Keeney v. Tamayo-Reyes*, 504 U.S. ___, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), does not apply in this situation. Nothing in the Court's opinion in that case suggests that the state there waived the exhaustion requirement, nor

that the federal courts would not apply a procedural default in the absence of a state court holding because of the permissive nature of the statutory rule. Hence, the Fourth Circuit's unique and unreasonably high standard for obtaining an evidentiary hearing on this claim, in contrast with other courts, warrants this Court's grant of certiorari.

4a. Whether The Court of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim Of Ineffective Assistance Of Counsel For Failure To Investigate, Develop, And Present Available Mental Health Evidence In Mitigation Of The Sentence Of Death?

4b. Did The Court Err By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That The Petitioner Show Clear and Convincing Evidence, Both Positive and Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?

As noted in Claim 1, above, petitioner asserted that he was denied the effective assistance of counsel at the penalty phase of his trial by counsel's failure to investigate, prepare and present available mental health evidence in mitigation of the sentence of death. As noted in Claim 3c., above, the Fourth Circuit established a unique and unreasonably high standard of proof in order for a habeas claimant to obtain an evidentiary hearing on this ineffectiveness claim. The standard, the presentation of clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to the petitioner's mental capacity, *Lawson*, 3 F.3d at 754, was taken from the standard for a habeas petitioner seeking to obtain an evidentiary hearing on a claim that he was substantively not competent at the time of trial. *See, e.g., Card v. Dugger*, 911 F.2d 1494, 1519-20 (11th Cir. 1990); *Flugence v. Butler*, 848 F.2d 77, 79 (5th Cir. 1988).

Those federal courts do not, however, apply this standard to a claim of ineffective assistance of counsel for failure to investigate, develop and present available mental health evidence in mitigation of the sentence of death. Those circuits have simply applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Townsend v. Sain*, 372 U.S. 293 (1963). *See, e.g., Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

> The district court also rejected the contention that Blanco's mental health mitigating evidence demonstrated ineffectiveness because Blanco did not show that he was incompetent at the time of trial. But there is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.

Blanco, 943 F.2d at 1503, *citing Perri v. State*, 441 So. 2d 606, 609 (Fla. 1983). Insofar as the Fourth Circuit has established this unique and wholly unreasonable standard for obtaining an evidentiary hearing on a claim of ineffective assistance of counsel for failure to investigate, develop and present mental health evidence in mitigation of the death sentence, and it is in conflict with other federal courts of appeals, this Court should grant certiorari to decide the appropriate standard.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, this 24th day of January, 1994.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served on counsel for the State by mailing a copy of same to Joan H. Byers, Esquire, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina, 27602, with sufficient postage affixed thereto.

Marshall Dayan

APPENDIX

plicable to the employee, Hawkes, was reasonable, but in doing so it would have severely to limit, curtail or even contradict what it has said before. I do not accept that we are free to treat a controlling state rule of law applied by the highest court in the Commonwealth of Virginia so cavalierly.

Accordingly, I would hold the non-compete clause overbroad and hence invalid. I would uphold the district court throughout. So to that extent I dissent.

David LAWSON, Petitioner–Appellant,

v.

Gary DIXON, Warden, Central Prison, Raleigh, North Carolina, Respondent–Appellee. (Two Cases)

Nos. 92–4003, 92–4004.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 3, 1992.

Decided Aug. 26, 1993.

Petitioner was convicted of first-degree murder and sentenced to death, in the state courts. After exhausting state appellate remedies, petitioner sought federal writ of habeas corpus. The United States District Court for the Middle District of North Carolina, Frank W. Bullock, Jr., Chief Judge, denied writ and appeal was taken. The Court of Appeals, Ervin, Chief Judge, held that: (1) petitioner was not entitled to evidentiary hearing on his request for psychiatric expert assistance; (2) defendant was not entitled to evidentiary hearing on mental health claims; and (3) prosecutorial comments did not prejudice defendant.

Affirmed.

1. Costs ⇐302.2(2)

Appointment of an expert for purposes of mounting defense at trial is mandatory, under statute applying to criminal cases generally, if defendant satisfies statutory prerequisites of indigence and necessity. 18 U.S.C.A. § 3006A(e), (e)(1).

2. Habeas Corpus ⇐883.1

Congress has mandated application of federal funds for legal representation of habeas corpus petitioners, as well as investigative, expert and other services, under the Comprehensive Drug Abuse Prevention and Control Act, provided petitioner can demonstrate that he is financially unable to secure assistance on his own and that such assistance is "reasonably necessary" for his representation. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(4)(B), (q)(9), 21 U.S.C.A. § 848(q)(4)(B), (q)(9).

3. Habeas Corpus ⇐847

Magistrate judge did not commit reversible error, even though he moved sua sponte to hold hearing at which effect of mental health expert's assistance on habeas petitioner's claims would be ascertained, rather than holding ex parte hearing on motion; there was concern that presence of expert might cause expansion of petitioner's claims regarding his mental condition, beyond scope of claim raised in petition, creating potential exhaustion of state remedies problem and risk that entire petition would be required to be dismissed as "mixed," even though state had waived right to assert exhaustion claims. 18 U.S.C.A. § 3006A(e); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

4. United States Magistrates ⇐21

Magistrate judge was not required, under applicable statutes, to hold ex parte evidentiary hearing, at which petitioner's motion for psychiatric expert assistance could be adjudicated. 18 U.S.C.A. § 3006A(e)(1); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

5. Habeas Corpus ⇐883.1

Appointment of psychiatric expert to assist habeas petitioner was not "necessary" or "reasonably necessary," as required for government to bear expense; as petition had already been filed, expert's help was not necessary in that phase, and expert had already formed opinion as to mental condition of petitioner. 18 U.S.C.A. § 3006A(e)(1); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

6. Habeas Corpus ⇐748

Habeas petitioner is not entitled to evidentiary hearing on mental competency claims unless he presents clear and convincing evidence that creates real, substantial, and legitimate doubt with respect to petitioner's mental capacity and ability to assist his counsel at trial, which is both positive and unequivocal.

7. Habeas Corpus ⇐748

In order to meet standard for obtaining evidentiary hearing on mental competency claim, habeas petitioner must present history of mental illness, or substantial evidence of mental incompetence at or near time of trial supported by opinions of qualified physicians and testimony of laymen.

8. Criminal Law ⇐798(.5)

Trial court instruction in murder case, requiring jury to find unanimously beyond reasonable doubt that aggravating circumstances found by jury outweigh any mitigating circumstance or circumstances found by jury, was not erroneous even though instruction did not specify that jury did not have to agree on existence of particular mitigating circumstance.

9. Criminal Law ⇐772(6)

Instruction, that a jury finding that defendant had intentionally killed victim with deadly weapon proximately causing death would result in the law implying deed was done with malice, was not error even though it was claimed jury should have been informed that finding allowed inference of malice; instruction merely shifted burden of production of malice evidence to defendant, but did not shift ultimate burden of proof.

10. Constitutional Law ⇐268(8)

Criminal Law ⇐723(1)

Due process rights of defendant were not prejudiced in state court murder trial even though prosecution improperly stated in summation of guilt phase that victim's house was not his castle but his "crucifixion block" and that it was "sickening to me to think that defendants are tried in the beautiful courtroom like this," and that defendant's constitutional rights should be compared with those of victims; evidence of guilt was overwhelming. U.S.C.A. Const.Amend. 14.

Marshall Lawrence Dayan, Office of Appellate Defender, North Carolina Resource Center, Raleigh, NC, argued (Harry L. Hopkins, Jr., Atlanta, GA, on brief), for petitioner-appellant.

Joan Herre Byers, Sp. Deputy Atty. Gen., North Carolina Dept. of Justice, Raleigh, NC, argued (Lacy H. Thornburg, Atty. Gen. of North Carolina, Barry S. McNeill, Sp. Deputy Atty. Gen., on brief), for respondent-appellee.

Before ERVIN, Chief Judge, and WIDENER and NIEMEYER, Circuit Judges.

OPINION

ERVIN, Chief Judge:

These consolidated appeals arise from the district court's dismissal of David Lawson's petition for the writ of habeas corpus, 28 U.S.C. § 2254, and concomitant denial of his motion for relief from judgment, Fed.R.Civ.P. 60(b). Finding no merit in Lawson's five assignments of error to the judgments below, we affirm.

I

A detailed recitation of the facts surrounding the crimes of which Lawson was convicted may be found in the opinion of the Supreme Court of North Carolina on direct appeal. *See State v. Lawson*, 310 N.C. 632, 634–38, 314 S.E.2d 493, 495–96 (1984). The following paragraphs summarize this factual

background and the criminal proceedings it spawned.

In December 1980 Buren Shinn and his son Wayne resided in houses approximately 100 yards apart on Old Salisbury Road some three miles from Concord, North Carolina. Buren and Wayne worked together in a family electrical repair business headquartered at Buren's house. After driving to work early on the morning of December 4, 1980, Wayne heard the burglar alarm sound in his own house. Buren and Wayne immediately leapt into Wayne's truck and proceeded to Wayne's house, where they observed a dirty, brown Ford automobile parked in the driveway. Wayne left the truck and ran towards the patio that lay on one side of the house. Buren saw Wayne throw up his hands and walk through a set of sliding glass doors, whereupon Buren heard two or three shots ring out. Buren ran to the truck, got in, and began backing the truck in an effort to escape. A man ran towards him, waving a pistol. His attention diverted, Buren backed the truck into a ditch. The man approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with the man not to hurt him.

Before Buren reached the patio, he heard another gun shot and felt a sharp blow to his head. He fell to the ground, unconscious. When Buren regained consciousness he found himself lying in a large pool of blood. Fearing that his assailant might still be in the vicinity, he kept silent. Some twenty or thirty minutes later, Buren heard someone walk toward him and felt a hand reach into his pocket and remove his wallet. Buren remained motionless for twenty more minutes. Hearing no footsteps and seeing no one, he began to crawl from the patio toward the road, hoping to halt a passing car. When no one stopped, he struggled to his feet and walked home. After telephoning for help, Buren's second son, Jerry, left to check on his brother's condition. Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound to the head. Buren's injuries were not severe, for the bullet which struck him did not penetrate the skull. He recovered after a short hospital stay.

The police found Wayne's house ransacked. They discovered a pillowcase containing several pieces of jewelry and a camera, apparently dropped by the intruder. Marks on the kitchen door indicated that the house had been forcibly entered.

David Lawson was charged in the Superior Court of Cabarrus County with three crimes: (1) the first-degree murder of Wayne Shinn; (2) the assault with a deadly weapon with intent to kill inflicting serious injury on Buren Shinn; and (3) the felonious breaking and entering of the home of Wayne Shinn. The State's case-in-chief consisted primarily of the testimony of two witnesses: Buren Shinn and Phyllis Soden. When Buren Shinn took the stand, he identified Lawson as his assailant, and related the facts set forth above. Phyllis Soden, with whom Lawson once had shared a residence, testified that she returned home from work at about 4:00 a.m. on December 4, 1980. Shortly after 9:00 a.m. Lawson arrived at Soden's house and stated that he needed her to "take him someplace immediately." Leaving his brown Ford in her driveway, the two departed in her automobile. Lawson directed Soden to drive on Old Salisbury Road. As they neared Wayne Shinn's residence Lawson told Soden to stop, let him out, drive a short distance farther, turn around, and return to pick him up. Soden followed Lawson's directions. When she returned to Shinn's house, Lawson ran to the car carrying a crowbar. After they returned to Soden's residence, Lawson explained that he had broken into a house and left the crowbar there. Fearing that the crowbar might have his fingerprints on it, he had been anxious to retrieve it. A little later Lawson showed Soden a wallet and removed the money from it. He told Soden that he had broken into a house after hearing that the residents had gold and jewelry.

According to Soden's testimony, Lawson told her that he had found some items in the house and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. Lawson pointed his gun at the man, who promptly put up his hands. Law-

son then ordered the man to turn around, whereupon he shot him in the back of the head. After the man fell, Lawson ran out of the house and spied another man approaching the patio. The other man turned, ran, and got into a truck. Lawson ordered the man out of the truck. Although the man begged Lawson not to shoot, Lawson forced him to walk toward the patio and shot him in the back of the head. He was confident that both men were dead because he shot them at close range. Lawson killed them, according to Soden, both in order to eliminate witnesses to the robbery and because he did not want to "go back to prison."

Lawson offered no evidence during the guilt-innocence phase of the trial. After the jury returned guilty verdicts on all three charges, the proceedings turned to a consideration of sentence. In open court but outside the presence of the jury, Lawson was examined under oath by his attorney, James C. Johnson. During this examination Lawson testified that Mr. Johnson had fully advised him regarding the nature of the sentencing phase of the proceeding. Lawson also acknowledged that on June 6, 1981 he signed an affidavit in which he acknowledged that he told Mr. Johnson

> on at least five occasions ... that I should be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The superior court then advised Lawson that, notwithstanding his desire to be sentenced to death, the jury must decide his punishment and that the court was required by law to submit whatever aggravating and mitigating circumstances were supported by the evidence to the jury for consideration. The court stated: "Even though you may ask the jury to recommend the death sentence in this case, the jury is not bound by it and the jury may ... still see fit to recommend life imprisonment."

The jury was then brought back into the courtroom. Lawson testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the State "involving some criminal matters in Stanly County some years ago." The following colloquy then took place between Lawson and his attorney:

> Q: At this time would you tell the jury what your request is regarding their decision?
>
> A: I'd like the death penalty.
>
> Q: Would you care to tell us why you want the death penalty?
>
> A: To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life, that's not right. You think I done it, gas me.
>
> Q: And you're—you know what you're asking?
>
> A: Yes, sir.
>
> Q: You know it's my responsibility to try to save your life?
>
> A: Yes, sir.
>
> Q: That's all.

A brief cross examination by the state followed, during which Lawson admitted that he owned a .32 calibre pistol in September 1980; that he attempted to purchase a pistol shortly after December 4, 1980; and that on December 4, 1980 he had gone to Salisbury with Phyllis Soden. At the guilt-innocence phase of the trial, a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 calibre bullet.

The jury found as aggravating circumstances that the murder of Wayne Shinn was "committed for the purpose of avoiding a lawful arrest" and was "part of a course of conduct in which [Lawson] engaged and [which] include[d] the commission by the defendant of other crimes of violence against [another person]." *See* N.C.Gen.Stat. § 15A–2000(e)(4) & (11) (1988 & Supp.1992).

The jury next found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Two specific mitigating circumstances were submitted: (1) that Lawson had no "significant prior history of criminal activity," and (2) that Lawson "testified truthfully on behalf of the prosecution in another prosecution of a felony." *See id.* § 15A–2000(f)(1) & (8). The jury also was asked to consider whether any other circumstances existed which it deemed to have mitigating value. *See id.* § 15A–2000(f)(9). The jury did not specify which of the mitigating circumstances it found, but it did indicate that it found the existence of "one or more mitigating circumstances." The jury finally found that the aggravating circumstances outweighed the mitigating circumstances and recommended that Lawson be sentenced to death by administration of lethal gas.

Following affirmance of his convictions and death sentence by the Supreme Court of North Carolina, *see State v. Lawson*, 310 N.C. 632, 634, 314 S.E.2d 493, 495 (1984), and the denial of his petition for the writ of certiorari by the Supreme Court of the United States, *see Lawson v. North Carolina*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985), Lawson filed a motion for appropriate relief pursuant to N.C.Gen.Stat. § 15A–1411 (1988 & Supp.1992) in the Superior Court of Cabarrus County, raising claims of ineffective assistance of counsel at trial and on direct appeal.[1] Lawson's motion also challenged the impartiality of the jury empaneled to try his case and the sufficiency of the evidence supporting the aggravating circumstances as found by the jury. Later Lawson amended his motion for appropriate relief to challenge the State's excusal for cause of jurors with scruples against capital punishment. He then further amended it to allege (1) a claim of ineffective assistance of counsel in failing to present mitigating evidence at the penalty phase of the trial; (2) the absence of a reliable sentencing determination because of the absence of mitigating evidence; (3) the unconstitutionality of a jury instruction imposing on the jury a duty to pronounce the death sentence if aggravating circumstances outweighed mitigating circumstances; and (4) ineffective assistance of counsel in failing to have transcribed and to present the closing arguments of counsel at trial to the Supreme Court of North Carolina for review. Following an evidentiary hearing, the superior court denied the motion for appropriate relief as amended. Both the Supreme Court of North Carolina, *see State v. Lawson*, 322 N.C. 114, 367 S.E.2d 919 (1988), and the Supreme Court of the United States, *see Lawson v. North Carolina*, 485 U.S. 1016, 108 S.Ct. 1494, 99 L.Ed.2d 883 (1988), denied Lawson's petitions for appellate review.

On July 12, 1988, assisted by new counsel, Lawson sought federal collateral relief by filing the instant petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of North Carolina. Lawson acknowledged that many of the claims raised by his petition had not been presented to the Superior Court of Cabarrus County in his motion for appropriate relief. The petition assigned multiple claims of constitutional error to the guilt-innocence and sentencing phases of his trial, and set forth in summary form the facts supporting each claim. Rather than await the dismissal of this "mixed" petition as required by *Rose v. Lundy*, 455 U.S. 509, 520–21, 102 S.Ct. 1198, 1204–05, 71 L.Ed.2d 379 (1982), Lawson expeditiously filed a second motion for appropriate relief in the Superior Court of Cabarrus County, raising the previously unexhausted claims that appeared in the habeas petition. Lawson

1. Specifically, Lawson claimed that James C. Johnson, his counsel in the trial and appellate proceedings before the state courts of North Carolina, had rendered him ineffective assistance of counsel with respect to (1) his motion to change venue; (2) jury selection; (3) the identification procedures employed at trial; (4) his failure adequately to challenge the sufficiency of the evidence to support aggravating factors at the penalty phase on direct appeal; (5) his failure adequately to challenge the sufficiency of the evidence to support the jury's imposition of the death sentence; (6) his failure adequately to challenge the proportionality of the death sentence; (7) the preparation and filing of a petition for the writ of certiorari in the Supreme Court of the United States; and (8) the preparation of the record on appeal and the written brief in the Supreme Court of North Carolina.

asked the district court not to consider his habeas petition until the state remedies on claims first raised in the petition had been exhausted. The respondent,[2] objecting to Lawson's motion to hold the habeas petition in abeyance, asked the court to sever the exhausted from the unexhausted claims, adjudicate only the exhausted claims, and consider the unexhausted claims in a subsequent petition after the state courts had been afforded an opportunity to rule upon them. The district court rejected this approach, and referred the petition to a magistrate judge for recommended findings of fact and conclusions of law as permitted by 28 U.S.C. § 636(b)(1)(B).

The magistrate judge recommended that the petition be dismissed as "mixed" under *Rose v. Lundy*. The district court agreed, dismissed the petition, and dissolved the stay of execution it had entered to permit Lawson to seek federal collateral relief. In a motion to alter or amend judgment and a motion for relief from order brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, the respondent then repeated his request that the court not dismiss the petition but sever the unexhausted claims and adjudicate only the exhausted claims. The respondent filed a written statement specifically indicating that he would unconditionally waive the defense of nonexhaustion of state remedies if his motion to alter or amend was allowed.

On the basis of this promised waiver, the district court granted the respondent's motion, amended its judgment, and vacated its order dismissing the petition for failure to exhaust state remedies completely as to all claims raised in Lawson's habeas petition. The court rejected the respondent's proposal to sever the exhausted from the unexhausted claims and adjudicate only the exhausted claims. The court also rejected the respondent's alternative proposal that the court consider the exhausted as well as the unexhausted claims only on the record developed before and during direct appeal to the Supreme Court of North Carolina and on Lawson's first Motion for Appropriate Relief in the Superior Court of Cabarrus County.

On April 6, 1989 the magistrate judge heard oral argument on the issues raised by Lawson's petition, and held the litigation in abeyance pending disposition of state-court proceedings for reconsideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). On November 19, 1991 the magistrate judge filed an order recommending that Lawson's petition be dismissed and that his motions for discovery, appointment of a psychiatric expert, and an evidentiary hearing be denied. *See Lawson v. Dixon*, No. C–88–738–S, slip op. at 7 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge). The district court adopted the magistrate judge's recommendations, and entered a judgment dismissing the petition on January 7, 1992. *See Lawson v. Dixon*, No. C–88–738–S, slip op. at 1–2 (M.D.N.C. Jan. 7, 1992) (judgment and order). Lawson then moved to alter or amend the judgment, and further moved for relief from the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure based on our decision in *Williams v. Dixon*, 961 F.2d 448, 451–59 (4th Cir.), *cert. denied* — U.S. —, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992); both motions were denied.

Lawson gave notice of appeal as to both the dismissal of his petition and the denial of his Rule 60(b) motion. The appeals were consolidated for briefing and argument herein.

II

Certain aspects of the district court's treatment of Lawson's motion for the appointment of a psychiatric expert are relevant to the issues raised by these appeals. In his petition for the writ, Lawson raised four principal claims regarding the effect of his psychological health upon the guilt-innocence and sentencing phases of his trial. Specifically, he alleged (1) that he was not competent to be sentenced; (2) that he lacked sufficient ability to consult with his counsel with a reasonable degree of rational understanding and with a view to preparing his defense; (3) that he was not competent to, and did not, knowingly, intelligently, and voluntarily waive his constitutional right to a reliable sentencing determination; and (4) that his death sentence was rendered in the absence of a reliable sentencing hearing. On February 1, 1989, after his petition had been laid before the district court, Lawson filed, *ex parte*, a motion for the appointment of a psychiatric expert to assist in the development and presentation of his mental-health habeas claims, or in the alternative for an *ex parte* evidentiary hearing in which he would have the opportunity to show that expert psychiatric services were reasonably necessary to the full and fair adjudication of these claims. This motion was predicated upon provisions of the Criminal Justice Act, 18 U.S.C. § 3006A(e), and the Anti-Drug Abuse Act of 1988, 21 U.S.C. §§ 848(q)(4)(B) and (q)(9).

On April 4, 1989, acting *sua sponte*,[3] the magistrate judge held a hearing at which Lawson was required to reveal to the respondent the basis for his motion to appoint a psychiatric expert. After the hearing, the magistrate judge required Lawson to brief and identify those habeas claims for which he had requested an evidentiary hearing on the appointment motion. The respondent replied with a motion to dismiss the petition in its entirety, contending that the appointment motion so altered Lawson's habeas petition that it raised a new, unexhausted claim. According to the respondent, this new claim rendered the petition "mixed"—and therefore subject to dismissal—under *Rose v. Lundy*, 455 U.S. 509, 520–21, 102 S.Ct. 1198, 1204–05, 71 L.Ed.2d 379 (1982).

In his recommended findings of fact and conclusions of law, issued on November 19, 1991, the magistrate judge determined that Lawson's effort to expand his mental competency allegations with a new opinion from a psychiatric expert constituted a "significantly different claim" involving "critical factual evidence which would attempt to markedly improve the posture of [Lawson's] claim." *See Lawson v. Dixon*, No. C–88–738–S, slip op. at 16 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge). Because the psychiatrist's testimony would have been the first evidence from any expert indicating possible mental incompetency, the magistrate judge held that Lawson's motion constituted a new (and therefore unexhausted) claim. *Id.* The magistrate judge further held, however, that the respondent should not be permitted to withdraw his unconditional waiver of exhaustion[4] simply because Lawson was attempting to introduce additional proof in support of his factual allegation of incompetency, which had been among the claims directly subject to the respondent's waiver. *Id.* at 17. The magistrate judge reasoned, *inter alia*, that the respondent should have known that the district court would not restrict its review of Lawson's claim to the record before the state

2. The respondent, Gary T. Dixon, is warden of Central Prison in Raleigh, North Carolina, where Lawson presently is incarcerated.

3. At the hearing on Lawson's motion, the magistrate judge made it clear that he had summoned both parties *sua sponte* to discuss the motion's impact on Lawson's habeas petition generally. *See, e.g.*, J.A. 742 (magistrate judge stating that "[t]he reason why I called you gentlemen is that I received an ex parte motion from the petitioner with respect to requesting the appointment of a psychiatric expert"); *id.* 744 (magistrate judge stating that "I just thought I'd call a hearing [to resolve Lawson's motion]").

4. The magistrate judge properly recognized that exhaustion is not a jurisdictional requirement, but rather arises from interests of comity between the state and federal courts. Indeed, whether a federal court of appeals should require exhaustion is under some circumstances discretionary. *See Granberry v. Greer*, 481 U.S. 129, 132–36, 107 S.Ct. 1671, 1674–76, 95 L.Ed.2d 119 (1987). Because exhaustion is not a jurisdictional bar, the state may waive it. *Id.* Yet the waiver must be unconditional. *See Sweezy v. Garrison*, 694 F.2d 331, 331 (4th Cir.1982) (per curiam), *cert. denied*, 461 U.S. 908, 103 S.Ct. 1882, 76 L.Ed.2d 812 (1983); *Harding v. North Carolina*, 683 F.2d 850, 852–53 (4th Cir.1982) (holding conditional waiver "flatly incompatible" with the spirit of the comity considerations inherent in the exhaustion requirement).

Although the instant case does not present, and we do not reach, the question of when a state's waiver of exhaustion as to particular issues in a section 2254 petition ought to be accepted or rejected, we agree with the Eighth and Eleventh Circuit Courts of Appeals that district courts have discretion to do either. *See Purnell v. Missouri Dep't of Corrections*, 753 F.2d 703, 708–10 (8th Cir.1985); *Thompson v. Wainwright*, 714 F.2d 1495, 1509 (11th Cir.1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984).

courts, as the respondent already had sought unsuccessfully to limit the court's consideration of the petition to the record previously developed before the state tribunals. *Id.* at 17–18.

Because neither party directly challenges on appeal the validity of the magistrate judge's holding with respect to the respondent's waiver of exhaustion, the question before us involves only the merits of the judge's denial of Lawson's motion. The magistrate judge denied Lawson's request for the appointment of a psychiatric expert because Lawson had "failed to show the necessity" for the appointment. *Lawson v. Dixon*, No. C–88–738–S, slip op. at 7 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge). After reviewing the supporting affidavit of the psychiatrist Lawson asked the court to appoint, the magistrate judge held that Lawson was not entitled to relief or to an evidentiary hearing on his appointment motion. *See id.*

III

Lawson now assigns error to three aspects of the district court's denial of his motion for appointment of a psychiatric expert. First, he contends that the magistrate judge erred by failing to hold *ex parte* proceedings to adjudicate his motion. Second, he urges that the court applied incorrect legal standards in deciding the motion. Third, he argues that the court's conclusions of fact are not fairly supported by the record as a whole. We address these contentions seriatim.

A

By far the thorniest issue the instant appeal presents is Lawson's claim that the district court's judgment should be reversed because the magistrate judge failed to hold an *ex parte* proceeding to adjudicate his appointment motion. The question is one of law; we therefore review the decision below *de novo*. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 508 & n. 27, 104 S.Ct. 1949, 1959, 1964 & n. 27, 80 L.Ed.2d 502 (1984).

[1] Lawson's motion clearly invoked both 18 U.S.C. § 3006A(e) and 21 U.S.C. §§ 848(q)(4)(B) and (q)(9) as alternative grounds for the appointment of a psychiatric expert. These statutes provide that the district courts may appoint counsel and other experts to assist criminal defendants in judicial proceedings under certain circumstances. The principal difference between the Title 18 and Title 21 provisions lies in the litigative postures under which they afford defendants expert assistance.

18 U.S.C. § 3006A(e) provides in relevant part:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 U.S.C. § 3006A(e)(1). Thus, defendants who wish to have the assistance of experts at trial or in collateral-attack proceedings may apply for government funds to pay the cost of employing such experts pursuant to section 3006A(e)(1). If the district court or magistrate judge assigned to the case finds that the defendant cannot obtain the desired services on the strength of his own purse, the court must authorize the defendant's counsel to seek and employ such experts as are "necessary" to the defense. Therefore, appointment of an expert for purposes of mounting a defense at trial is mandatory under Title 18 if the defendant satisfies the statutory prerequisites of indigence and necessity.

[2] By contrast, 21 U.S.C. § 848(q)(4)(B) and (q)(9), read together, provide counsel and expert services only in the context of post-conviction collateral attacks upon the validity of prior federal- and state-court convictions and sentences. Specifically, the Anti–Drug Abuse Act of 1988, Pub.L. No. 100–690, § 7001(b), 102 Stat. 4181, 4193–94 (1989), amended section 408 of the Controlled Substances Act, 21 U.S.C. § 848, to provide counsel and ancillary support to certain defendants seeking to challenge a sentence of death in post-conviction proceedings under sections 2254 or 2255 of Title 28. The relevant portions of section 848(q)(4)(B) of Title 21 now state that

> [i]n any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraph[ ] ... (9).

21 U.S.C. § 848(q)(4)(B). Paragraph (9) of this subsection provides that

> [u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore [sic]. ...

21 U.S.C. § 848(q)(9). By the terms of the statute, Congress mandated the application of federal funds for legal representation of habeas corpus petitioners as well as investigative, expert, and other services, provided the prisoner[5] can demonstrate that he is financially unable to secure the assistance on his own and that such assistance is "reasonably necessary" for his representation.

[3] Whether a district court's failure to hold "ex parte proceedings" in order to adjudicate an appointment motion under 21 U.S.C. § 848(q)(9) constitutes reversible error is, so far as we are able to determine, a question of first impression in the federal courts. The few cases that have arisen under the statute since its enactment have dealt exclusively with the merits of such appointments. *See, e.g., In re Lindsey*, 875 F.2d 1502, 1505–08 (11th Cir.1989) (per curiam). This paucity of authority is hardly surprising; the clear purpose of the statute is to provide counsel and experts for the assistance of habeas corpus petitioners, not to require the holding of *ex parte* proceedings for their own sake.

Yet it is equally plain that the statute contemplates *ex parte* proceedings as the proper device for adjudicating appointment motions. We observe that 18 U.S.C. § 3006A(e), the analogous appointment provision of the Criminal Justice Act, has been interpreted as virtually guaranteeing that decisions on expert-appointment motions will be made, as that statute requires, "after appropriate inquiry in an ex parte proceeding." 18 U.S.C. § 3006A(e)(1). *See United States v. Chavis*, 476 F.2d 1137, 1141–42 (D.C.Cir. 1973) (stating that "[a] defendant's indigency [sic] and need for assistance under § 3006A is to be determined by an *ex parte* proceeding"); *United States v. Hamlet*, 456 F.2d 1284, 1285 (5th Cir.1972) (per curiam) (holding that "the trial court erred in denying the § 3006A motion without conducting the ex parte inquiry required by the statute"); *United States v. Theriault*, 440 F.2d 713, 715 (5th Cir.1971) (same). We agree without hesitation that *ex parte* proceedings are the only proper means of adjudicating appointment motions contemplated by the language of both the Title 18 and Title 21 statutes. The plain language of section 848(q)(9) should not, therefore, be overlooked simply because (for example) the court prefers all such motions to be handled on the record.

5. In the absence of any meaningful legislative history of 21 U.S.C. §§ 848(q)(4)(B) and (q)(9), some might argue that the statute's counsel and expert-services provisions were intended to apply only to those federal death sentences imposed under the Anti–Drug Abuse Act, *see* 21 U.S.C. § 848(e), and not to state death-penalty cases under federal habeas corpus review. Such an interpretation would, in our view, fly in the face of the statute's plain meaning. Because death sentences imposed under the Act will be handed down by federal courts for federal crimes, only one of the statutory predicates for section 848(q)(4)(B)—28 U.S.C. § 2255—would ever be used. Of course, 28 U.S.C. § 2254 is the primary vehicle by which state prisoners challenge state criminal judgments in federal court. We believe that by referring to section 2254, Congress clearly intended to create a counsel and expert-services guarantee in federal habeas review of state-imposed death sentences as well.

In this case, however, certain countervailing considerations are present. This matter already had assumed an advanced procedural posture when it came before the district court for decision. The respondent had waived the exhaustion requirement unconditionally with respect to all the claims in Lawson's habeas petition. The court was concerned that Lawson's motion for the appointment of an expert might result in an expansion of his mental-health claims beyond their scope in the habeas petition, and that the respondent would then move to dismiss the petition as "mixed" under *Rose v. Lundy*. Desiring to avoid the waste of judicial resources such a scenario would entail, the magistrate judge moved *sua sponte* to hold a hearing at which the effect of the expert's assistance on Lawson's habeas claims could be ascertained.

Under these circumstances, we hold that the magistrate judge's failure to adjudicate Lawson's motion "in an ex parte proceeding," 18 U.S.C. § 3006A(e)(1), or "in ex parte proceedings," 21 U.S.C. § 848(q)(9), was not reversible error. The court's action was a justifiable attempt to ensure that the factual allegations supporting Lawson's petition had been "fairly presented" to the state courts prior to federal habeas corpus review. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). Because

> it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation[,]

federal courts apply the doctrine of comity, which

> teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Darr v. Burford, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950); *see also Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982) (same); *Duckworth v. Serrano*, 454 U.S. 1, 2, 102 S.Ct. 18, 18, 70 L.Ed.2d 1 (1981) (per curiam) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

Where petitions for the Great Writ brought pursuant to 28 U.S.C. § 2254 are concerned, the responsibility for "rigorously enforcing [the] total exhaustion rule," *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203, and thereby preserving comity between the federal and state judicial systems, necessarily falls upon the shoulders of the federal court with jurisdiction of the petition. Therefore, we conclude that it was proper for the magistrate judge to hold a hearing *sua sponte* to consider the exhaustion question presented by Lawson's motion. We emphasize that this holding, which effectively creates a narrow exception to the "ex parte proceeding" requirements of 18 U.S.C. § 3006A(e)(1) and 21 U.S.C. § 848(q)(9), is limited to motions made *sua sponte* by the district court for the purpose of ascertaining whether, and ensuring that, the petitioner's claims have been totally exhausted by a state tribunal when the State has waived exhaustion voluntarily.[6]

[4] In the alternative, Lawson contends that the magistrate judge erred by failing to hold an *ex parte* evidentiary hearing at which his appointment motion could be adjudicated. Because the predicate statutes do not require the holding of a hearing, we reject this contention. 21 U.S.C. § 848(q)(9) and 18 U.S.C. § 3006A(e)(1) speak merely of "proceeding(s)" to be conducted *ex parte*. Following the holding of the *sua sponte* hearing, the magistrate judge offered Lawson the opportunity to answer the respondent's motion to dismiss his petition with written justifications for his request that a psychiatric expert be appointed. The magistrate judge's recommended findings of fact and conclusions of law amply reflect the care with which the court considered Lawson's arguments on this point. The purpose of the statute's "proceeding" requirement is to ensure that the petitioner's motion is carefully examined by the court, not to force the holding of formal hearings for their own sake. Therefore, we conclude that the magistrate judge did not err by failing to hold a hearing on the merits of his appointment motion.

6. Thus, we anticipate that, where the State has entered no waiver of exhaustion, district courts will continue to hold the *ex parte* proceedings required by the appointment statutes, and will, in the concealed venue of such proceedings, inform petitioners deemed to be raising new and unexhausted habeas claims that their petitions will be dismissed pursuant to *Rose v. Lundy* absent the bringing of additional state-court proceedings to exhaust the new claims.

B

We now consider Lawson's contention that the district court erred by applying the incorrect legal standard in adjudicating his appointment motion.

[5] Both 18 U.S.C. § 3006A(e)(1) and 21 U.S.C. §§ 848(q)(9) require (1) that the habeas petitioner be financially unable to obtain the requested expert services on his own, and (2) that such services be "necessary" (18 U.S.C. § 3006A(e)(1)) or "reasonably necessary" (21 U.S.C. § 848(q)(9)) for the defendant's representation. Neither party contests Lawson's indigence. The only question, therefore, is whether expert services are "necessary" or "reasonably necessary" for Lawson's prosecution of the mental-competency claims in his habeas petition.

Lawson moved for the appointment of an expert psychiatrist after filing his habeas petition. Thus, he cannot assert that the psychiatrist's services were necessary to help prepare the claims in his pleading. Lawson proffered the affidavit of Dr. Billy Royal, the psychiatrist he asked the court to appoint, which stated that Dr. Royal already had formed his opinion on Lawson's alleged lack of competency and inability to waive his right to a sentencing hearing. Dr. Royal apparently requested further study on the issue of the presence of psychological mitigating evidence, although he opined tentatively in that area as well. Thus, it appears that Lawson already had marshalled the evidence he wished Dr. Royal to expound upon.

To determine whether Dr. Royal's appointment was "reasonably necessary," the district court had to decide whether the record, viewed in the light of Dr. Royal's forecasted evidence, required an evidentiary hearing in order to resolve the mental-competency claims in Lawson's habeas petition. Obviously, there was no need to appoint Dr. Royal if Lawson's petition raised no claims entitling him to a hearing at which the psychiatrist could present evidence of Lawson's competence. For the reasons stated in part IV, *infra*, we conclude that Lawson was not entitled to an evidentiary hearing on the claims presented in his habeas petition. We therefore hold that there was no "reasonable necessity" for Dr. Royal's appointment.

C

Finally, Lawson argues that the district court's factual analysis of his motion was clearly erroneous and not fairly supported by the record. For the reasons set forth in the magistrate judge's recommended findings of fact and conclusions of law, *see Lawson v. Dixon*, No. C–88–738–S, slip op. at 35–61 (M.D.N.C. Aug. 19, 1991) (order and recommendation of United States Magistrate Judge), we disagree. After carefully comparing Lawson's motion and accompanying affidavit with the relevant portions of the state-court record, we are not left with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Accordingly, we hold that the district court did not clearly err in analyzing Lawson's factual assertions with respect to his appointment motion.

IV

In his second argument for reversal, Lawson contends that the magistrate judge erred in denying his motion for an evidentiary hearing on the four mental-health claims presented in his petition for the writ because the claims contained allegations not subjected to factual development in the state courts.

[6, 7] A habeas petitioner is not entitled to an evidentiary hearing on mental-competency claims in his habeas petition unless he presents clear and convincing evidence that creates a real, substantial, and legitimate doubt with respect to the petitioner's mental capacity and ability to assist his counsel at

trial. Such evidence must be both positive and unequivocal. *See, e.g., Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). In order to meet this standard, we agree with the Fifth Circuit Court of Appeals that the petitioner must present "a history of mental illness, [or] substantial evidence of mental incompetence at or near the time of the trial supported by the opinions of qualified physicians and the testimony of laymen." *Flugence v. Butler*, 848 F.2d 77, 79 (5th Cir.1988). Should the petitioner clear this lofty hurdle, an evidentiary hearing will be convened at which he may prove his incompetence at the time of trial by a preponderance of the evidence.

For the reasons set forth in the magistrate judge's recommended findings of fact and conclusions of law, *see Lawson v. Dixon*, No. C–88–738–S, slip op. at 35–61 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge), we agree with the district court that Lawson has failed to present clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to his mental capacity. Accordingly, we affirm the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition.

V

Lawson also assigns error to three matters arising from the guilt-innocence and penalty phases of his trial. First, he contends that there is a reasonable likelihood that the penalty-phase jury instructions unconstitutionally required the jurors unanimously to find and consider mitigating evidence. Second, he argues that the jury instruction on the offense of first-degree murder created a presumption of malice and thereby denied him due process of law. Third, he urges that prosecutorial misconduct so infected the trial as to deny him due process of law and to render the sentencing determination unreliable. The district court declined to issue the writ on any of these grounds. Because we have rejected precisely these contentions in previous decisions, we find them meritless in the instant case.

A

[8] In instructing the jury with respect to the weighing of aggravating circumstances against mitigating circumstances during the penalty phase of Lawson's trial, the superior court stated:

> [The issue is] do you find unanimously beyond a reasonable doubt that the aggravating circumstance or circumstances found by you outweigg [sic] any mitigating circumstance or circumstances found by you.

Lawson attacks these jury instructions on the ground that they prevented the jury from considering mitigating evidence unless all twelve jurors agreed on the existence of a particular mitigating circumstance. He claims that the instructions in this respect violated the rules established in *Mills v. Maryland*, 486 U.S. 367, 384, 108 S.Ct. 1860, 1870, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 442, 110 S.Ct. 1227, 1233, 108 L.Ed.2d 369 (1990).

In *Maynard v. Dixon*, 943 F.2d 407 (4th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1211, 117 L.Ed.2d 450 (1992), this court examined a North Carolina jury instruction identical to that under review here. *Id.* at 419. We held that such an instruction "does not run afoul of *Mills/McKoy*" because it does not state that jurors must "agree unanimously" on the existence of a mitigating factor. *Id.* The question having been thus decided by a panel of this tribunal, we reject Lawson's argument without further discussion.

B

[9] During the jury charge at the guilt-innocence phase of Lawson's trial, the superior court instructed the jury that malice is

> that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which approximately [sic] results in death.

The superior court then instructed the jury with respect to first-degree murder that

> if the State proves beyond a reasonable doubt that the defendant intentionally killed ... Wayne Shinn with a deadly weapon that approximately [sic] caused his death, the law implies first, that the killing was unlawful, and second, that it was done with malice.

Lawson contends that this instruction was improper because it informed the jury that the law "implies," rather than allows, the drawing of an inference that malice existed. In *Rook v. Rice*, 783 F.2d 401 (4th Cir.), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986), and *Davis v. Allsbrooks*, 778 F.2d 168 (4th Cir.1985), this court considered North Carolina jury instructions identical to those under review here. In both cases we held that the instruction merely shifted the burden of production on the malice element of the crime to the defendant, but did not shift the ultimate burden of proof to him. *See Rook*, 783 F.2d at 405; *Davis*, 778 F.2d at 172–74. In light of our holdings in *Rook* and *Davis*, therefore, we reject Lawson's contention without further discussion.

C

[10] During summation at the guilt phase of Lawson's trial, the prosecutor argued to the jury that the victim's house was not his castle but his "crucifixion block." The prosecutor also argued that it was "sickening to me to think that defendants are tried in the beautiful courtroom like this." The prosecutor further stated that Lawson's constitutional rights should be compared with those of the victims, noting that Buren Shinn "had no attorney sitting next to him." He also urged that in other countries, after being convicted of first-degree murder, authorities would bring a rope and hang the defendant summarily. Lawson contends that these arguments so infected his trial as to render it fundamentally unfair, and that he therefore is entitled to the writ.

In *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), the Supreme Court reiterated that the standard in habeas cases for assessing improper prosecutorial comment is, as initially enunciated in *Donnelly v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), whether the proceeding at issue was rendered fundamentally unfair by the improper argument. *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471; *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. This standard is the same for both the prosecution's guilt-innocence and penalty phase arguments. *E.g., Adams v. Aiken*, 965 F.2d 1306, 1320 (4th Cir.1992), *cert. denied sub nom. Adams v. Evatt*, — U.S. —, 113 S.Ct. 2966, 125 L.Ed.2d 666 (1993); *Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir.1990), *cert. denied*, — U.S. —, 112 S.Ct. 14, 115 L.Ed.2d 1098 (1991). In determining whether a prosecutor's comments denied the defendant fundamental fairness, the Supreme Court has emphasized the necessity of looking to the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated. *Darden*, 477 U.S. at 182, 106 S.Ct. at 2472; *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873.

Here the evidence of Lawson's guilt was overwhelming. The prosecutor's comments, while excessive and needlessly inflammatory, were relatively isolated. Viewing the comments in light of the superior court's accurate instructions to the jury on the elements of the crimes charged and the heavy quantum of proof necessary to convict the defendant of their commission, we hold that the State's closing arguments did not deprive Lawson of due process.

VI

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

KEY NUMBER SYSTEM

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 26, 1993

No. 92-4003

CA-88-738-S

DAVID LAWSON

Petitioner - Appellant

v.

GARY DIXON, Warden, Central Prison, Raleigh, North Carolina

Respondent - Appellee

No. 92-4004
CA-88-738-S

DAVID LAWSON

Petitioner - Appellant

v.

GARY DIXON, Warden, Central Prison, Raleigh, North Carolina

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
SALISBURY DIVISION

FILED
NOV 19 1991
Clerk, U. S. District Court
Middle District of N. C.

DAVID LAWSON,

Petitioner,

v.

GARY DIXON, WARDEN,
Central Prison,
Raleigh, North Carolina,

Respondent.

C-88-738-S

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, seeks relief pursuant to 28 U.S.C. § 2254. Petitioner alleges that his conviction and sentence are unconstitutional. He requests an evidentiary hearing and the appointment of a psychiatrist to further examine him with respect to his claims of mental incompetency at the time of his state trial. The unusual procedural nature of the case presents a number of thorny issues in addition to the merits of the petition.

A. Procedural History and Issues Before the Court

Petitioner was tried and convicted at the June 1, 1981 criminal session of Superior Court in Cabarrus County, North Carolina, for the charges of first-degree murder, burglary and felonious assault. The house of Wayne Shinn was burglarized and he was murdered when he investigated the break in. Shinn's father Buren was hunted down and shot to eliminate him as a witness but he survived. The jury recommended the penalty of death for the first-degree murder charge and such sentence was entered. In addition, petitioner was sentenced to twenty years imprisonment for the assault with a deadly weapon with intent to kill Buren Shinn, which was to run consecutive with the first-degree murder sentence if, for any reason, a penalty of less than death were entered. Petitioner was given a ten-year sentence for the felonious breaking or entering charge which was set to run at the expiration of the assault with a deadly weapon conviction.

Petitioner appealed his conviction and it was affirmed by the North Carolina Supreme Court on April 30, 1984. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984). The United States Supreme Court denied certiorari on May 20, 1985. Lawson v. North Carolina, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985).

Petitioner filed a motion for appropriate relief in Cabarrus County Superior Court on February 11, 1986. The petition was amended on May 8 and May 21, 1987. One of petitioner's present counsel, Harry H. Harkins of the Orange County Bar, represented petitioner at that time. A hearing was held on May 26, 1987 and an order was entered denying relief on July 1, 1987. Both the North Carolina Supreme Court and the United States Supreme Court denied certiorari. State v. Lawson, 322 N.C. 114, 367 S.E.2d 919 (1988), and Lawson v. North Carolina, 485 U.S. 1016, 108 S.Ct. 1494, 99 L.Ed.2d 883 (1988).

On April 14, 1988, petitioner filed, in this Court, a motion to stay his execution, pending disposition of the petition for writ of certiorari by the United States Supreme Court, to give him time to file a petition for writ of habeas corpus. The motion was

granted and petitioner was given sixty days to file the petition. Petitioner's counsel employed the resources of the North Carolina Death Penalty Resource Center. Petitioner requested and received a thirty-day extension of time.

The petition for a writ of habeas corpus in this Court raises numerous grounds, most of which have not been previously presented to the state courts. Therefore, petitioner also filed a motion to hold proceedings in abeyance pending resolution of a new, contemporaneously filed, state post-conviction motion. Respondent opposed that motion. Respondent requested the Court only adjudicate the exhausted claims or if the unexhausted claims were considered, use only the present record. The Court denied both petitioner's motion and respondent's request. It found that Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), prohibited ruling on a mixed petition of both exhausted and unexhausted claims. It further concluded that a stay of a mixed petition was also unwarranted. A limited stay of thirty days was granted to permit the petitioner to pursue the state post-conviction relief and obtain a stay of execution from that court.

Thereafter, respondent moved to alter or amend the judgment pursuant to either Fed. R. Civ. P. 59(e) or ~~60~~. Respondent was directed to specifically clarify the premises of certain issues raised in the motion. Respondent replied that if he was permitted to answer, the state would unconditionally waive exhaustion on all unexhausted claims in the petition. In granting the motion, the

Court emphasized the understanding that if respondent were permitted to answer, the state would unconditionally waive the exhaustion requirement with respect to unexhausted claims, but would be permitted to preserve, for appeal purposes, the Court's previous denial of its request that the Court only proceed and adjudicate petitioner's exhausted claims or that the Court only consider unexhausted claims limited by the present record which had been developed during the direct appeal and first post-conviction motion for appropriate relief.

Based on respondent's assurance that he would unconditionally waive exhaustion of non-exhausted claims, the Court found no need to dismiss the petition. It granted respondent's motion and vacated the prior dismissal of this action. Respondent filed an answer wherein he explicitly waived the exhaustion requirement as to the unexhausted claims.

Thereafter, petitioner filed an ex parte motion for funds for the appointment of a psychiatric expert. On April 4, 1989, a hearing was held to determine the further progress of the petition. Petitioner was required to reveal to respondent the basis for his motion to obtain funds for the appointment of a psychiatric expert. After the hearing, the Court required petitioner to brief and identify those claims for which an evidentiary hearing was requested. Respondent replied with a motion to dismiss the petition in its entirety based on petitioner's bad faith.

Respondent's motion to dismiss contends that petitioner's motion for the appointment of a psychiatric expert (to be used at

an evidentiary hearing in support of the claim that petitioner was incompetent to proceed at his trial) so altered the petitioner's claims that it, in essence, raised a new claim. And this new claim has not been exhausted and, therefore, should be dismissed pursuant to Rose v. Lundy. Soon thereafter, petitioner moved to defer further proceedings until he could seek state court relief in light of the United States Supreme Court decision in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The stay was granted.

After the North Carolina Supreme Court denied petitioner relief, this case was again activated on the Court's docket. In the meantime, respondent requested and was granted permission to amend his answer in order to object to any of petitioner's claims which are based on an attempted retroactive application of a new rule of constitutional law and, therefore, prohibited by Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The Court directed that the parties submit additional briefing on this issue as well as the issue of procedural default. It directed petitioner to set out all transcript citations for his claims. Finally, the Court converted respondent's answer and implicit motion to dismiss to a motion to dismiss and for summary judgment, notified the parties and ordered further briefing.

B. Issues Before the Court

Petitioner has moved for permission to conduct discovery pursuant to the Federal Rules of Civil Procedure and for an

evidentiary hearing on numerous claims. (Plead. No. 36) In addition, petitioner requests the appointment of a psychiatrist to help him further investigate his claim that he was incompetent at the time of his trial. (Plead. No. 34) Respondent claims that the introduction of new evidence in the form of an expert psychological opinion amounts to asserting a new claim. He contends he has not unconditionally waived exhaustion as to this new claim. Therefore, he argues that the petition now contains both exhausted and unexhausted claims and must be dismissed.

Respondent further contends that a number of claims must be dismissed as seeking to advance a new rule of constitutional law in a collateral proceeding contrary to the mandates of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Finally, respondent asserts that many of the claims should be dismissed for petitioner having failed to comply with North Carolina procedural requirements as to them.

Petitioner's general request for discovery will be denied. Rule 6, Rules Governing Section 2254 Cases, requires that any request for discovery be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, which are sought to be produced. Furthermore, discovery may only be granted upon good cause shown. In the instant case, petitioner has not identified the discovery nor shown good cause nor does the Court independently perceive any need. Therefore, that request shall be denied.

Petitioner's request for the appointment of a psychiatric expert pursuant to 18 U.S.C. § 3006A(e)(1) shall be denied as well. Requests for expert psychiatric assistance should be granted if the person is indigent and the Court finds the services to be necessary. See Jones v. Murray, ____ F.2d _____ n.4 (4th Cir. 1991). In the instant case, petitioner requests the appointment of a psychiatric expert to help him investigate his claim that he was incompetent at the time of his trial. Petitioner fails to show a necessity therefor. Petitioner has submitted an affidavit from his expert indicating the nature of the opinion which would be forthcoming. Accepting the opinion for purposes of this decision, the Court has reviewed the competency issue and finds that petitioner is not entitled to either relief or an evidentiary hearing and, therefore, a psychiatric or psychological expert need not be appointed.

Petitioner also requests an evidentiary hearing and sets out those claims for which a hearing is requested. The Court has accepted petitioner's facts as alleged and, nevertheless, finds that either he is not entitled to relief or the claim is barred. Therefore, his request for an evidentiary hearing shall be denied as well.

Respondent requests that certain claims be dismissed because they seek to assert a new constitutional rule or apply a new rule established subsequent to petitioner's conviction being final. Respondent has identified those claims. The Court will discuss its ruling on this issue as each claim is reviewed.

Finally, respondent moves to dismiss, on the grounds of procedural default, all claims which petitioner failed to raise either on direct appeal or in a motion for appropriate relief before the state court. Because this might obviate a review of the petition on the merits, the Court will discuss this issue presently. But first it will consider respondent's motion to dismiss because petitioner has allegedly raised a new, unexhausted claim.

B.(1) Respondent's Motion to Dismiss Petition for Non-Exhaustion

In respondent's motion to dismiss, he contends that as a result of petitioner's request for the appointment of a psychiatric expert and the affidavits in support thereof, petitioner has essentially raised a new claim not previously presented. This allegedly constitutes a significant alteration of petitioner's claims and justifies the instant motion to dismiss for non-exhaustion.

Petitioner retorts that Dr. Royal's affidavit merely provides an expert opinion for the same facts and allegations contained in the petition and, therefore, does not constitute a significant alteration of the mental health claims presented to the Court. In addition, petitioner asserts that the state's position is not reasonable. Petitioner points out that when the petition was first filed, the Court dismissed it for lack of exhaustion of state court remedies. In so doing, the Court rejected respondent's request to limit its review to those claims which were exhausted in state court. The state thereafter unconditionally waived exhaustion.

Petitioner argues that in so doing, respondent necessarily must have known that the federal district court would not be bound by an inadequately developed state court record and, therefore, must have anticipated that the mental health claims would be bolstered by expert evidence because of the very nature of those claims. Furthermore, the state should have known that when it voluntarily waived exhaustion, it took a risk that any claim not adequately developed below would have to be developed in federal court.

Petitioner further opposes respondent's motion to dismiss because he withdrew his second motion for appropriate relief in state court in reliance on respondent's unconditional waiver of exhaustion of state court remedies. Petitioner suggests that he does not have a further remedy in state court and that he should not suffer prejudice for his reliance on the state's tactical choice made many months ago.[1]

The Court will first turn its attention to whether the affidavit presented by Dr. Royal in support of petitioner's motion for the appointment of an expert witness and examiner constitutes a significant alteration in petitioner's claims so as to present,

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[1]Petitioner contends that he withdrew his motion for appropriate relief after being invited to do so in the Court's September 21, 1988 Order. Petitioner's July 14, 1989 Reply at 15. However, that Order did not contain an invitation. Rather petitioner infers one based on his own set of expectations. The Court merely stated that because the state would unconditionally waive the exhaustion requirement, the Court saw no need to dismiss the petition or to entertain a stay of proceedings while petitioner litigated the matter in state court. It added as an aside, emphasizing the lack of need to dismiss or stay, that petitioner could well decide to dismiss the state court petition. This clearly was not an invitation, but rather a discussion of a possible factual scenario which persuaded the Court to reject the alternatives of dismissal or stay as suggested by the parties and to simply let the matter proceed in federal court under respondent's unconditional waiver of the exhaustion requirement.

in essence, a new claim for relief. Respondent admits that the petition contains allegations that petitioner was not competent to be sentenced, not competent to waive his right to a reliable sentencing determination, that the court should have conducted a hearing, and that counsel's failure to consider and present mental health mitigation evidence violated petitioner's rights as well. However, respondent argues that none of the claims mention that their factual basis will be the psychiatric affidavit evidence of Dr. Royal. Nor was there an indication that petitioner would seek to expand the record either. Respondent acknowledges that petitioner did make a general request for an evidentiary hearing. He emphasizes that petitioner did not reveal, as a basis for the hearing, the affidavit of Dr. Royal, but rather, merely said that the previous hearing in state court was not full and fair. Respondent argues that as a consequence, it was reasonable for him to assume that petitioner was only relying on the facts already in the record to support his claim.

Petitioner, of course, argues to the contrary. He claims respondent should have been aware that if the Court found the state court hearing not to be full and fair, then a federal hearing might well be required, and a new hearing was especially likely when, as here, there was no state court hearing on the issue.

Dr. Royal's affidavit reveals that he specializes in the practice of psychiatry. (Pleading 35) He was recently asked to provide an opinion on petitioner's competency at the June, 1981 sentencing and to evaluate the presence of a mental health

mitigation defense as an issue for post-conviction proceedings. He held several interviews with petitioner and reviewed petitioner's pretrial psychiatric evaluation. In his opinion, the pretrial evaluation was deficient for failing to develop or assess social or developmental history to support the psychiatric findings and did not attempt to "understand the psychological person that David Lawson was . . . ." He opines that petitioner was not competent to proceed with the sentencing because of petitioner's mental health problems and the stress of the trial. He asserts that petitioner was not capable of assisting his attorney in the preparation and presentation of evidence or in appreciating the nature of the sentencing process.

Dr. Royal bases his opinion on his conclusion that petitioner has a low self-image and self-esteem which results in self-destructive behavior, stemming in part from his abandonment by his parents, the behavioral problems with his mother and step-father leading to his placement in an adolescent correctional center, and from his not being welcome at his home. He further opines that petitioner has fear of rejection and a macho view of the world. Dr. Royal reveals that petitioner, who was essentially on his own since the age of fifteen, tried to re-establish a relationship with his natural father which did not work out as expected. Petitioner fathered a daughter and when the relationship with the woman ended, he attempted suicide.

According to Dr. Royal, these facts explain petitioner's inability to control his behavior and lack of capacity to

understand options at trial and in particular, at sentencing. He states that even at sentencing petitioner could not comprehend any information given to him on a rational, objective basis and that the pathology of self-destructive behavior, macho image, depression and emotional turmoil at the time resulted in petitioner "making his rather bizarre decisions at the time of the penalty phase." In addition, he states that the same factors played a role in petitioner's behavior at the time of offense and that there is evidence that the use of drugs at the time of offense could have impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. He further states that further contact and evaluation with petitioner is necessary to better understand the ideology and development of the pathology.

The Court will first examine whether this affidavit by Dr. Royal should be viewed as a new claim which has not been exhausted. Thereafter, the Court will explore what effect, if any, respondent's waiver of exhaustion should have if the claim is found to be a new one.

The exhaustion requirement is not jurisdictional but involves matters of comity between federal and state court systems. Landano v. Rafferty, 897 F.2d 661, 668 (3d Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990). It must be strictly construed, not just to preserve harmony between our dual judicial systems but to increase a likelihood that factual allegations will be fully developed in state courts prior to federal court habeas

corpus review. Id. In order to demonstrate compliance with the exhaustion requirement, a petitioner must show that he has fairly presented his claims to the state courts. Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). "[F]airly presented" has been defined as being when the federal claim is the substantial equivalent to the state claim. Picard v. Connor, 404 U.S. at 278.

A claim is substantially equivalent only when the state court has been presented with the same factual and legal claims relied upon in the petition. Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982). Under this analysis, a new factual basis to support a claim, not just a new legal theory, constitutes non-compliance with the exhaustion requirement. Oftentimes, it may be difficult to determine whether a particular new fact will constitute additional evidence which will require exhaustion in state court. The Fourth Circuit indicates that not all bits of new evidence will create a new claim. Rather, only those bits of "critical evidence" which make the evidentiary basis for the case significantly different and stronger. Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030, 1033 (4th Cir. 1988).

What constitutes "critical evidence" may not always be easy to ascertain. However, several courts have fleshed out some considerations. In Landano v. Rafferty, 897 F.2d 661, and Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030, the courts found a new claim when new facts were used to support a Brady violation (see United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87

L.Ed.2d 481 (1985)). In Landano, the court found that the mere identification of Brady claims in the state post-conviction petition did not comprehend any additional Brady claims based on entirely different facts. And in Wise, even though the petitioner had already identified the witnesses' agreement in state proceedings, when he obtained factual support of the existence of such agreement, this new proof of the factual claim was critical evidence which, therefore, significantly altered the posture of the claim sufficiently to amount to a new claim.

The Sixth Circuit has also entered into the foray of what constitutes a new factual claim in Sampson v. Love, 782 F.2d 53 (6th Cir.), cert. denied, 479 U.S. 844, 107 S.Ct. 159, 93 L.Ed.2d 98 (1986). There, the petitioner attempted to introduce an affidavit of jury vindictiveness. The prior claim amounted to speculation of the same, based on a mere inference. The court found the new fact put the case in a significantly different posture and constituted a new claim.

Petitioner cites the Supreme Court's decision in Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), in support of his position. There, the Supreme Court held that the habeas petitioner did not circumvent the exhaustion requirement when the district court, pursuant to Rule 7(b) of the Rules Governing Section 2254 Actions, directed the parties to present supplemental evidence consisting of affidavits and a computer analysis of the mathematical possibility that the exclusion of blacks from the grand jury may have been due to chance or accident.

The Supreme Court noted that such evidence is the normal type of proof in discrimination claims and added nothing to the case not considered intrinsic in the consideration of such claims. Vasquez v. Hillery, 474 U.S. at 259. Petitioner argues here that expert psychiatric evidence in this case is also normal and intrinsic to competency claims. See Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Petitioner's argument is not without merit. However, Vasquez cannot be stretched to cover petitioner's case. The Supreme Court decision did not rest solely on the fact that statistical evidence was intrinsic to grand jury discrimination cases. The Court relied on the additional fact that it was the district court itself which expanded the evidentiary record. Vasquez v. Hillery, 474 U.S. at 258. The court in Aiken v. Spalding, 841 F.2d 881, 884 n.3 (9th Cir. 1988), found this distinction to be crucial in facing a similar situation.

In Aiken, whether petitioner made a request for counsel became a crucial issue. The petitioner wished to submit an expert opinion considering the decibel level of petitioner's request for counsel recorded on audiotape. This would show that the request was at a level consistent with other requests to which the officers did respond. It would not prove that the officers heard the request for counsel, but merely that such request could be heard. Nevertheless, the court found this new proof created a new, unexhausted claim. It distinguished Vasquez v. Hillery, 474 U.S. 254, noting that in its case it was the petitioner, not the

district court, who intended to expand the record. It found this distinction to be crucial even though the petitioner only wished to present an expert opinion concerning facts already before the state court. That is the same situation facing this Court.

From these cases, one is left with a firm impression that most new facts that are important to a claim constitute "critical evidence."[2] And it makes no difference that the new facts are only expert opinions relating to facts already in the record. Petitioner's attempt to expand his mental competency claims with a new opinion from an expert witness constitutes a significantly different claim of critical factual evidence which would attempt to markedly improve the posture of petitioner's claim. This would be the first evidence from any expert indicating possible mental incompetency. It is a new claim.

Notwithstanding the finding that petitioner is attempting to present new, critical evidence in support of his claim, that does not end the matter. The instant case is different from other cases because of its peculiar procedural posture. Here, respondent unconditionally waived exhaustion as to this very claim. The Court finds this additional factor is sufficiently significant to alter the general rule prohibiting the presentation of new critical evidence without exhaustion of such factual claims in state court.

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[2] But see Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991). There, in a capital murder case, petitioner sought to introduce, in federal court, additional facts about his childhood in support of a claim that he should have been permitted to introduce non-statutory mitigating factors. The court found that the additional introduction of facts concerning defendant's childhood, which could include both favorable and unfavorable evidence, did not involve sandbagging by the petitioner in order to introduce an entirely new claim in federal court but merely served to present additional facts.

As stated previously, exhaustion is not a jurisdictional requirement, but rather arises from interests of comity between state and federal courts. Landano v. Rafferty, 897 F.2d at 668. In fact, it is discretionary with appellate courts. Granberry v. Greer, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987). Because exhaustion is not jurisdictional, the state may waive exhaustion. Id. However, the waiver must be unconditional. Id.; Sweezy v. Garrison, 694 F.2d 331 (4th Cir. 1982), cert. denied, 461 U.S. 908, 103 S.Ct. 1882, 76 L.Ed.2d 812 (1983). Not only are conditional waivers of exhaustion prohibited, but in addition, the Court may not allow the state to engage in conduct that amounts to a conditional waiver. Stamper v. Baskerville, 724 F.2d 1106 (4th Cir. 1984). In Stamper, the state waived exhaustion as to claims only after the district court ruled that the claims would be dismissed on the merits. (Case was remanded to require district court to dismiss both exhausted and unexhausted claims.)

In the instant case, petitioner complains that the state should not be permitted to retract its unconditional waiver of exhaustion when it finally learns that petitioner may introduce additional proof in support of a factual allegation of incompetency. The Court agrees for several reasons.

First, respondent knew or should have known that the Court would not restrict its review of petitioner's claim to the record before the state courts. As petitioner points out in his brief, the state had previously sought to limit the Court's consideration of the petition to the record previously developed in state court.

However, this was rejected. Thus, the state knew there was the possibility of a hearing on the competency issue.

Second, petitioner requests an evidentiary hearing on other issues as well. But respondent has not made a motion to dismiss for failure of exhaustion of remedies as to those claims. Thus, in petitioner's memorandum in support of his motion for an evidentiary hearing (pleading 36), petitioner requests a hearing on jury instructions so that he can present a linguistic expert concerning what a reasonable jury understands from the jury instructions. Petitioner requests a hearing concerning the waiver of his rights, including the right to counsel at the sentencing hearing. Petitioner wishes to present evidence on ineffective assistance of counsel and the change of venue record which he claims was not sufficiently developed. Petitioner requests an opportunity to present statistical evidence concerning the unconstitutionality of the death penalty as imposed in Cabarrus County. Finally, petitioner seeks an evidentiary hearing to look into the absences of petitioner at the trial proceedings.

All of these claims contemplate additional evidence and facts, including an expert opinion, if the motion is granted. The Court can see no difference between petitioner's request for a hearing as to these issues as opposed to his request for a hearing and the introduction of evidence concerning the mental competency issue. The only distinguishing factor the Court perceives in respondent's different position is that respondent perceives the issue of mental competency to be a closer question, one which might in fact require

a federal hearing. The Court may not tolerate this type of conditional waiver of the exhaustion requirement. Stamper v. Baskerville, 724 F.2d 1106. Therefore, in the instant case, the Court would best preserve the integrity of federal-state relations and judicial proceedings by denying respondent's request to withdraw its unconditional waiver concerning the incompetency allegations even though petitioner will possibly be allowed to present new proof, not presented to the state courts.

This decision has the additional benefit of avoiding the possible prejudice which petitioner may otherwise suffer as a result of the unusual procedural nature of this case. After respondent unconditionally waived the exhaustion requirement, petitioner abandoned his state court action and dismissed it. Because of petitioner's election to dismiss the second motion for appropriate relief, he may be barred from raising these new claims if he should try to return to state court. The loss of this hope provides some additional basis for holding respondent's feet to the fire.

Finally, the Court finds that respondent will not be unfairly prejudiced by this decision. As will be pointed out later, claims of incompetency at the time of trial can be raised in post-conviction relief even if not raised at trial. Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987). However, petitioner bears a heavy burden in such instance. Id. Considering the nature of the claim, the Court finds that permitting petitioner to pursue the matter in federal court better serves the ends of justice and would

not injure federal-state relations. Therefore, respondent's motion to dismiss the petition for petitioner's failure to exhaust the alleged new claim based on new proof of petitioner's mental incompetency should be denied. For these same reasons, the Court should deny respondent's motion to amend the answer to add this allegation as a defense.

B.(2) Dismissal of Claims for Being Procedurally Defaulted

Respondent alleges that a substantial number of petitioner's claims are not available for review in federal court because of petitioner's procedural defaults in state court. Federal district courts are directed not to review federal claims denied by state courts when the state decision is premised on a state law ground which is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. Coleman v. Thompson, ____ U.S. ____, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

This solicitude to state law arises from concerns of comity and federalism. Id. Moreover, when the independent and adequate state ground is based on a state procedural default, there are additional reasons for refusing to review the claim. A procedural default effectively deprives the state of an opportunity to correct its own mistake because the matter has not been presented to the state court first. Id. Therefore, when federal court refuses to entertain claims which have been procedurally defaulted, it furthers the same policy which supports the exhaustion requirement.

Exhaustion and procedural default differ in one respect, however. While a state may unconditionally waive the exhaustion of remedies requirement, that waiver does not encompass procedural defaults. Therefore, even though a respondent may have waived the exhaustion requirement, a federal court is still precluded from entertaining the claim if it determines that state law would bar review of the claim because of a procedural default. Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991). The reason for this is that "when it is clear that the state law would bar state review, exhaustion is not required, and federal review is precluded." Id. at 937. Respondent waived exhaustion but requested the Court apply the procedural default rule. Therefore, the Court must look to North Carolina law in order to determine which claims have been procedurally defaulted.

Respondent has identified those claims which petitioner raised previously in his motion for appropriate relief or on direct appeal. Those are: Claim VI; those parts of Claim VII alleging ineffective assistance of counsel on appeal with respect to failing to appeal the change of venue and special venire motion, exclusion of three jurors, exclusion of jurors for opposition to the death penalty, prosecutorial misconduct, the death penalty being disproportionate and arbitrary; Claim IX; Claim X and Claim XIII. See November 1, 1988 Answer at 3-9. Petitioner does not dispute the list. The remaining claims have never been presented to the state courts.

In order to apply state procedural default rules, the federal court must find that the state practice makes sense and is more than an empty ritual. James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). That is, the remedy must be adequate. The state courts must be firmly committed to consistently applying a general rule with exceptions only for extraordinary situations. Meadows v. Legursky, 904 F.2d 903, 906 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 523, 112 L.Ed.2d 534 (1990). However, consistent application does not mean "undeviating adherence to such rule admitting of no exception." Id. at 907.

North Carolina's rule for procedural default is found at N.C.G.S. § 15A-1419. The statute permits a motion for appropriate relief to be denied when a petitioner was in a position to raise the issue previously but did not. Section 15A-1419(a)(1).[3] A

[3] N.C.G.S. § 15A-1419(a)(1) further provides that it does not apply to claims of deprivation of the right to counsel at trial or the failure of the trial court to advise the defendant of such right. Petitioner urges the Court to include claims of ineffective assistance of counsel within the exception, citing Perry v. Rogers, No. 88-7194 (4th Cir. April 28, 1988)(unpublished). However, this Court would disagree with petitioner's interpretation.

The state courts have not interpreted the exceptions to N.C.G.S. § 15A-1419(a)(1). In interpreting state statutes, this Court is required to make a determination of how the highest court in North Carolina, the North Carolina Supreme Court, would interpret the statute. Sanderson v. Rice, 777 F.2d 902, 906 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986). In so doing, it is concluded that the North Carolina Supreme Court would not interpret Section 1419(a)(1) as exempting claims of ineffective assistance of counsel.

The official commentary to Section 1419(a)(1) does not make any mention of an ineffective assistance of counsel claim. Rather, it notes that the first exception is a "rather obvious one of deprivation of the right to counsel." Not having counsel at all is, in fact, a very serious matter. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). An ineffective assistance of counsel claim is one of an entirely different nature and does not rise to the level of total denial of counsel. In contrast, the total deprivation of counsel is more like a claim of lack of jurisdiction which may not be waived. See Hailey v. Dorsey, 580 F.2d 112, 115 (4th Cir. 1978), cert. denied, 440 U.S. 937, 99 S.Ct. 1282, 59 L.Ed.2d 495 (1979).

(continued...)

motion for appropriate relief may also be denied when the issue was previously determined on the merits. N.C.G.S. § 15A-1419(a)(2). Finally, subsection (a)(3) provides for a procedural default when petitioner was in a position to adequately raise the matter in an appeal but failed to do so. Section 1419(b) acts as a safety valve and provides a court with discretion to grant the relief "in the interest of justice and for good cause shown."

The North Carolina courts do enforce the procedural default rule of N.C.G.S. § 15A-1419. State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391, 395 (1980); see Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, ___ U.S. ____, 111 S.Ct. 693, 112 L.Ed.2d 683 (1991); and Cole v. Stevenson, 620 F.2d 1055 (4th Cir.)(en banc), cert. denied, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980). However, one must distinguish between enforcement of the bar in a situation where the state court has itself enforced the bar from when the matter is before the federal court in the first instance and the state has waived exhaustion of remedies.

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[3](...continued)

To read the statute as excepting ineffective assistance of counsel claims would effectively frustrate the entire purpose of having a procedural default rule. Such claims can be legion and based on any matter in the trial whereas the denial of counsel vel non is usually a single, discrete act. A petitioner could litigate his conviction indefinitely.

The unpublished decision in Perry v. Rogers, supra, bases its conclusion on the fact that in another, unrelated circumstance, the North Carolina Supreme Court indicated that the right to counsel contemplates effective assistance of counsel. It is unlikely that the North Carolina Supreme Court would create such a large gap in its procedural default rule based on the application of a general principle. Therefore, it is concluded that Section 1419(a)(1) does not except petitioner's ineffective assistance of counsel claims from the procedural bar of Section 1419(a)(1).

When the state court has itself applied the procedural bar to one of petitioner's claims, the federal court need not speculate as to whether the state court would employ the bar as to that particular claim. When the state court has not employed the bar, a federal court needs to make a reasoned determination of whether the state court would apply the procedural bar rule even when the state has waived exhaustion of remedies. Bassette v. Thompson, 915 F.2d 932. The job of the federal court in North Carolina is particularly difficult because of the discretion given to state courts by Section 1419(b). The Court finds that Section 1419(b) is sufficiently ambiguous to preclude enforcement of the North Carolina procedural bar rule unless a state court has actually enforced it as to a particular claim.

Petitioner cites Richardson v. Turner, 716 F.2d 1059 (4th Cir. 1983). The situation before the Richardson court was slightly different but the Court feels bound by its reasoning. There, a district court decided both exhausted and unexhausted claims on their merit, finding that the state court likely would employ its procedural bar rule of N.C.G.S. § 15A-1419 as to the unexhausted claims. Finding a return to state court to be a futile action, the district court rendered judgment. On appeal, the Fourth Circuit determined that Section 1419(b) was not sufficiently fixed or certain so that one could conclude that the state court would not grant relief with respect to any specific claim. It noted that there was no reported decision interpreting the "interest of justice and for good cause shown" exception to Section 1419(b). It

further found that North Carolina superior court judges have employed it. It, therefore, determined that even though petitioner had previously filed for state post-conviction relief, the federal court could not determine that it would be futile to require him to exhaust any claims not previously presented to the state court.

Respondent has failed to show that the North Carolina courts do strictly or regularly enforce post-conviction procedural defaults when the petitioner seeks to come within the Section 1419(b) exception. Nor has any state court decision subsequent to Richardson construed Section 1419(b) so as to provide guidance in determining what issues come within the exception. Given these circumstances, respondent's request that this Court enforce the state procedural bar rules of Section 1419 against petitioner must be denied.

C. Merits

The Court will now turn its attention to the merits of petitioner's claims along with the subsidiary issues of whether petitioner is entitled to an evidentiary hearing or the appointment of a psychiatric expert, and whether the claims are barred for attempting to assert a new constitutional rule. It will address the claims in the order that they appear in the petition. The facts of this case will be summarized from the decision by the North Carolina Supreme Court.

> In December 1980, Buren Shinn resided in a house on Old Salisbury Road approximately three miles from Concord. Buren's son Wayne lived in a house located about 100 yards away. Buren and Wayne worked together in a family electrical business.

After driving to his father's home on 4 December 1980, Wayne heard the burglar alarm at his own home. Wayne and Buren jumped into a truck and rushed over to Wayne's house, where they observed a dirty brown Ford parked in the driveway. Wayne got out of the truck and ran towards the patio at the side of his house. Buren then saw Wayne throw up his hands and heard a gun fire.

Buren ran to the truck, got in and began backing the truck in an effort to get away. Defendant ran toward him, waving a pistol. This sight diverted Buren's attention and he backed the truck into a ditch. Defendant approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with defendant not to hurt him.

Before Buren reached the house, he heard another gunshot and felt a sharp blow to his head. He fell to the ground and lost consciousness. Sometime later he "came to," finding himself lying in a large pool of blood. Fearing that defendant might still be in the vicinity, he lay silently. Some twenty or thirty minutes later, he heard someone walk toward him and he felt a hand reach into his pocket and take his wallet.

Buren remained motionless for another twenty minutes. Hearing no more footsteps, he partly raised himself up. Seeing no one, he crawled away from the patio toward the road, hoping to stop a passing car. When no one stopped, he struggled to his feet and walked toward his home. As he entered his home, another son, Jerry, saw him and telephoned for help. After Jerry was told what had happened, he left to see about Wayne.

Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound to his head. Buren's injuries were not severe, as the bullet which struck him did not penetrate his skull. He recovered after a short stay in the hospital.

The police found Wayne's house ransacked. They found several jewelry items and a camera in a pillowcase, apparently dropped by the intruder. Marks on the kitchen door indicated the house had been forcibly entered.

Phyllis Soden, who had known defendant for several years, returned to her home from work at about 4 a.m. on 4 December 1980. Shortly after 9 a.m. defendant went to her home and stated that he needed her to take him some place immediately. Leaving his dirty brown Ford in her

driveway, the two departed in her automobile. Defendant directed her to drive on the Old Salisbury Road. As they neared the Shinn home he told her to stop, let him out, drive a short distance farther, turn around, and return to pick him up. She followed defendant's directions. When she returned, he ran to the car carrying a crowbar.

After they returned to Ms. Soden's home, defendant explained that he had broken into a house and had left the crowbar there. He wanted to retrieve the bar because it might have his fingerprints on it. A little while later, defendant showed her a wallet and removed the money from it. Thereafter, he told her: He had broken into a house after hearing that the residents had gold and jewelry. He found some items and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. He pointed his gun at the man who put up hands. He ordered the man to turn around and shot him in the back of his head. After the man fell, he ran out of the house. When he left the house, he saw another man approaching the patio. The other man turned, ran and entered a truck. He ordered the man out of the truck; and, although the man begged defendant not to shoot, defendant forced him to walk toward the patio and shot him in the back of his head. He was confident both of the other men were dead because he shot them at close range. He killed them to eliminate witnesses because he did not want to go back to prison.

Defendant offered no evidence at the guilt-determination phase of the trial.

The jury convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury upon Buren Shinn and felonious breaking of the home of Wayne Shinn. It also convicted him of the first degree murder of Wayne Shinn.

The following transpired at the sentencing phase of the murder case. Outside the presence of the jury defendant was examined under oath by his counsel. During this examination defendant testified that his counsel had fully advised him regarding the nature of the sentencing phase of the proceeding. Defendant also acknowledged that on 6 June 1981 he signed an affidavit in which he acknowledged that he told his attorney, Mr. Johnson,

> on at least five separate occasions . . . that should I be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The trial judge then advised defendant that notwithstanding his desire to be sentenced to death, the jury must make that decision and that the court by law was required to submit whatever aggravating and mitigating circumstances were supported by the evidence. The trial judge said, "Even though you may ask the jury to recommend the death sentence in this case, the jury is not bound by it and the jury may . . . still see fit to recommend life imprisonment."

The jury was then brought back into the courtroom. Defendant testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the state "involving some criminal matters in Stanly County some years ago." The following colloquy then occurred:

Q. At this time would you tell the jury what your request is regarding their decision?

A. I'd like the death penalty.

Q. Would you care to tell us why you want the death penalty?

A. To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life that's not right. You think I done it, gas me.

Q. And you're — you know what you're asking?

A. Yes, sir.

Q. You know it's my responsibility to try to save your life?

A. Yes, sir.

Q. That's all.

> There was a brief cross-examination by the state during which defendant admitted that he owned a .32 caliber pistol in September 1980; he had attempted to purchase a pistol shortly after 4 December 1980; and on 4 December 1980 he had gone to Salisbury with Phyllis Soden. At the guilt phase of his trial a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 caliber bullet.

State v. Lawson, 310 N.C. at 634-637, 314 S.E.2d 495-497.

Claim I - Jury Instructions Violated Mills/McKoy Rule

In his first claim for relief, petitioner alleges that the jury instructions in this case violated the rules, on how a jury may consider mitigating circumstances, established by the Supreme Court in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).

In Mills, the Supreme Court found jury instructions unconstitutional when there was a substantial probability that the jurors may have thought they were precluded from considering mitigating circumstances unless all of them agreed on the particular mitigating circumstance. The verdict form, which the jurors answered with respect to mitigating circumstances, indicated that they unanimously found mitigating circumstances. The Supreme Court found nothing in the judge's instructions that might dispel the erroneous inference. The Supreme Court was afraid that such a verdict form could lead jurors to think that one holdout member, who did not wish to find mitigating circumstances, could bind all of the others.

In McKoy, the court instructed the jurors on Issue Two which asked whether the jurors unanimously found from the evidence one or

more mitigating circumstances. The verdict form then instructed them to answer "Yes" as to each circumstance if they unanimously found it from the evidence, but write "No" if they did not so unanimously find. The Supreme Court again found this created the risk that a holdout juror could prevent the others from considering mitigating evidence which they believed would require them to vote against the death penalty.

Petitioner claims that the jury instructions in this case violated the Mills/McKoy rule. He points out that in a number of instances the state trial court instructed that the jury must act unanimously in reaching a sentence verdict or finding aggravating circumstances. He admits that the court did not instruct the jury to act unanimously in finding mitigating circumstances. However, he claims that the court should have made it clear that the jury need not act with unanimity with respect to mitigating circumstances.

Petitioner recognizes that his claim on this issue is very weak because the court peremptorily instructed the jury that it must find mitigating circumstances from the fact that petitioner did not have a significant criminal record and had cooperated with the state in other criminal cases. Thus, the jury was required to find mitigating circumstances. Nevertheless, petitioner states that there were other mitigating factors which the jury could have found and on which he bases his claim of prejudice. He points to the testimony which came out in the case-in-chief from petitioner's girlfriend and state witness that petitioner had not acted

violently and was helpful and from another state witness that petitioner came from a broken home, that his parents were divorced and he was brought up in Michigan by his mother.

Respondent requests this claim for relief be denied because pursuant to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)(capital sentencing), the court may not apply a new constitutional rule retroactively. In the instant case, petitioner's conviction became final when the United States Supreme Court denied certiorari review from his direct appeal. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (May 20, 1985). Mills and McKoy were, of course, decided long after that date. The Teague/Penry bar holds that new constitutional rules will not be applied retroactively in cases on collateral review unless they fall within two exceptions which will be discussed later. A new rule is one which breaks new ground or imposes a new obligation when the result was not dictated by existing precedent. Penry, 492 U.S. at 314.

The Court finds that the Mills/McKoy rule was the announcement of a new rule which may not be retroactively applied in this case. For this decision, the Court relies on the strongly worded dicta in McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 2840, 115 L.Ed.2d 1009 (1991). There, the Fourth Circuit stated that the Mills and McKoy cases represent new law which may not be retroactively applied based on Teague.

Petitioner's citations from other circuits do not explicitly decide the issue otherwise. Moreover, this Court has recently come to the same conclusion in Garner v. Dixon, C-88-179-WS (M.D.N.C. Sept. 11, 1991)(adopting June 25, 1991 Recommendation of U.S. Magistrate Judge). Furthermore, the Eastern District of North Carolina has held similarly in Smith v. Dixon, 766 F. Supp. 1370 (E.D.N.C. 1991). See also Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala.), stay and cert. denied, ____ U.S. ____, 111 S.Ct. 1, 111 L.Ed.2d 817 (1990).

Petitioner next asserts that the Mill/McKoy rule is not new but merely an extension of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 71 L.Ed.2d 1 (1982). This argument is rejected because in Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), the Supreme Court characterized those decisions as merely holding that the state cannot bar mitigating evidence. It found the cases had no application to the issue before it which was whether the state can instruct a jury not to base its decision on sympathy. This Court finds the Mill/McKoy issue before it is likewise not related to "what mitigating evidence the jury must be permitted to consider in making its decision, but to how [or when] it must consider the mitigating evidence." Saffle v. Parks, 494 U.S. at _____, 110 S.Ct. at 1261 (emphasis added).

Petitioner continues that his case falls within one of the two exceptions to the Teague/Penry bar. One exception is a rule which implicates the state's power to punish. He relies on the other

exception for watershed rules of criminal procedure which implicate fundamental fairness and accuracy of criminal proceedings. Teague v. Lane, 489 U.S. at 311. The Court disagrees.

In Saffle v. Parks, 494 U.S. 484, the Supreme Court elaborated on this exception. It noted that the exception was reserved for central and primary matters such as the right to counsel announced in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The alleged error of a trial judge instructing a jury not to consider sympathy did not fall within the exception. Neither does this case which only involves how or when a jury can consider mitigating evidence. In a sense, all sentencing rules seek to enhance fairness and accuracy. Petitioner would convert the exception into one without limits. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 305 (3d Cir. 1991), cert. denied, ____ U.S. ____, 112 S.Ct. 280, ____ L.Ed.2d ____ (1991). The McKoy/Mill rule is not an absolute prerequisite to fundamental fairness. See Id.

Even if the Teague/Penry bar were not available, petitioner is still not entitled to relief. The reason for this is that the sentencing instructions in the case do not violate the Mills and McKoy rule. Almost the exact situation arose in Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991).

The jury instructions in the instant case appear to be the same as those considered by the Fourth Circuit in Maynard. There, as here, the state court instructed the jury that it must render a unanimous decision with respect to its verdict and in particular with respect to finding aggravating circumstances. It was

instructed to determine unanimously the applicability of two aggravating circumstances and whether one or both were sufficiently substantial to call for the death penalty. However, with respect to the third issue of mitigating circumstances, the court did not mention that the finding had to be unanimous. Finally, as to the fourth issue, the jury was again instructed to determine whether it unanimously found the aggravating circumstances outweighed the mitigating circumstances.

The Fourth Circuit determined in Maynard that there was no error because the trial court carefully instructed the jury that it must unanimously find aggravating circumstances but did not impose such a requirement with respect to mitigating circumstances. It contrasted the situation from that in State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1403, 113 L.Ed.2d 459 (1991), which petitioner relies on. There, significantly, the North Carolina Supreme Court found that the trial court had stated that answers to all the issues must be unanimous. No such language was found in the Maynard instructions and, therefore, the court found no implicit instruction of a unanimity requirement with respect to mitigating circumstances. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 306-308 (3d Cir. 1991); Kordenbrock v. Scroggy, 919 F.2d 1091, 1120 (6th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991).

The same reasoning of Maynard applies to the instant case. Further distancing this case from McNeil, here the state court peremptorily instructed the jurors that they must find two

mitigating circumstances. Thus, the jury was required to make the answer to the mitigation issue "Yes," and was also told it could consider any other circumstance arising from the evidence. (Tr. 782) Under these circumstances, there is even less concern that the jury was somehow misled into thinking they must unanimously find a mitigating circumstance in order to consider it. Petitioner's request for the appointment of a linguistic expert to forecast what reasonable jurors would have determined from these instructions is unnecessary and should be denied. Therefore, petitioner's first claim for relief should be denied.

Claims II, III and Part of VII - Competency Issue

Petitioner makes three basic claims concerning the competency issue. The first two are directly asserted in Claims II and III. The other one arises in Claim VII, petitioner's ineffective assistance of counsel claims, at ¶¶ 110 and 111. Claim II alleges that petitioner was denied due process of law because he was not mentally competent to be sentenced.

For facts, petitioner states that as a result of early childhood development, he has a history of self-destructive behavior and behavioral manifestations indicative of severe mental illness. To support those conclusions, he recites that his parents separated when he was two years old and he lived with his maternal grandparents until the mother remarried when he was four years old. His step-father allegedly abused alcohol. Petitioner had a fight with the step-father and thereafter they had little communication. He quit school when he was fifteen or sixteen and moved out to live

on his own. He enlisted in the Marine Corps at seventeen but was discharged on a disability. Thereafter, he left Michigan and located his natural father but was not able to establish a satisfactory relationship. He worked as a logger and in a sawmill until the murder and his conviction for it.

Petitioner alleges that his feelings of helplessness were exacerbated by counsel erroneously telling him he would not be eligible for parole until after 180 years (PCHT 180-84).* Petitioner also claims that he was further depressed because his girlfriend, Phyllis Soden, to whom he disclosed and bragged about his crime and attempted to implicate in the coverup, testified against him at his trial. This allegedly caused him to feel betrayed and abandoned. These facts and other actions of his attorney allegedly demonstrated that others cared little about whether he lived or died and led him to abandon his own defense. As proof, petitioner recites that he did not offer evidence at the guilt or sentencing phases of the trial but that there were a number of people, including employers and friends, who would say that he was sad, honest, conscientious, easy going and not quick tempered. Petitioner states that these facts "impelled him to request that he receive the death penalty at sentencing."

In Claim III, petitioner alleges that he was not competent to waive his right to a reliable sentencing determination, the absence of which violates the eighth amendment of the United States Constitution. Petitioner re-alleges the grounds previously

*Post-Conviction Hearing Transcript of May 26, 1987 hearing.

discussed concerning Claim II. In addition, he objects that at the sentencing hearing, counsel introduced a signed statement whereby petitioner acknowledged that he understood the sentencing process and, nevertheless, still wished counsel to proceed as petitioner had directed him to do. Petitioner criticizes the court for not informing petitioner of his rights at sentencing or inquiring as to his mental state nor making any findings as to petitioner's mental state or holding a hearing on the matter.

With respect to the ineffective assistance of counsel claims, petitioner criticizes counsel for failing to make a motion for the appointment of a psychiatrist for the defense to assist him in preparation of the case for both guilt and sentencing. Petitioner alleges that counsel should have been aware of petitioner's "unusual behavior regarding reluctance to involve family members in the presentation of the penalty phase mitigation" (Petition at 31) as grounds to support this motion. Petitioner alleges that if a motion had been made, the trial court could necessarily have granted it. He further states counsel failed to present evidence to the court to support a motion for a psychiatrist.

Petitioner supplements the petition with his motion for the appointment of a psychiatric expert. He offers the affidavit of Billy Royal, M.D. Dr. Royal has interviewed petitioner several times and reviewed petitioner's psychiatric evaluation while at Dorothea Dix Hospital. He opines that the Dorothea Dix evaluation was deficient in failing to develop or assess a social or developmental history to support its psychological findings of

competency. He further offers an opinion that petitioner was not competent approximately eight years earlier, based on petitioner's developmental disabilities, depression and other mental problems, along with the stress of the situation. He recounts the facts previously stated in the petition. Dr. Royal offers the conclusion that petitioner has difficulty developing relationships with men and women. Petitioner allegedly accepts a "macho" view of the world, stressing physical courage, domination, aggressiveness or violence. He allegedly represses and denies his emotions, and likes to view himself totally in charge of a situation. Dr. Royal opines that this resulted in petitioner's inability to control his behavior and decisions during the trial process and resulted in his making the "rather bizarre" decision to wish death rather than life imprisonment. He adds that the same factors played a role in petitioner's behavior at the time of the offense and that there is evidence of drug use which may have impaired petitioner's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. He finally concludes that the substance abuse may have rendered petitioner mentally or emotionally disturbed at the time of the offense.

In addition, the Court has expanded the record to include the state court competency report of petitioner conducted at Dorothea Dix Hospital from January 29, 1981 to February 5, 1981. This report indicates petitioner was competent to stand trial and noted no history of mental illness or any sign of irrational or bizarre behavior which would give a hint of any incompetency or mental

infirmity. In submitting the competency report to the Court, respondent states that the state court record does not show that a motion was made for a competency hearing nor was a hearing held, presumably because the report provides no basis for either a motion or hearing.

The report was based on interviews with petitioner, a physical examination, tests and observation. It shows that petitioner was alert and cooperative and had a normal stream of mental activity. He did not have hallucinations or delusions. While he did not have suicidal thoughts, he reported his previous depression and thoughts concerning the time when he fathered an out of wedlock child. It also included his family and present social history.

The psychological report indicated petitioner suffered from low self-esteem, had feelings of inferiority, insecurity and inadequacy and was self-centered with an exaggerated need for affection. This led to his being somewhat self-dramatic, hostile, and resentful with a tendency to use projection and acting out as defense mechanisms. His impulse control was found somewhat deficient. The report concluded that he had an adjustment disorder but was fully competent to stand trial.

The report indicates that petitioner denied any use or significant use of alcohol or drugs and this was verified by his girlfriend Lisa Green. Furthermore, the progress notes indicate that petitioner tended to have a macho image of the world but that the interviewer felt that he was a genuinely tough person. He was

also described as being well oriented but with likely little conscience.

This description of petitioner does not vary markedly from that offered by Dr. Billy Royal. While Dr. Royal faults the Dorothea Dix evaluation for not developing a social or developmental history, the psychological description of petitioner is similar. What differs is the conclusion reached by the different evaluators. The Dorothea Dix people found petitioner to be competent. Dr. Royal, relying on essentially the same factors, finds petitioner incompetent. However, an additional part of Dr. Royal's opinion is premised on his categorization of petitioner's desire to die rather than suffer life imprisonment as a bizarre mental attitude. Yet, petitioner's Dorothea Dix examination testing results seem to indicate petitioner had a genuine loathing of incarceration. Also, Dr. Royal indicates there is evidence of drug use. However, the record shows that petitioner consistently denied drug use to the Dorothea Dix counselors, his own attorney, his girlfriend Phyllis Soden and his girlfriend Lisa Green.

Finally, the Court has considered the state post-conviction hearing transcript (PCHT) where the issue of competency was discussed. This reveals that counsel found that petitioner's mental processes, reasoning and logic were perhaps the best of any client he had represented. (PCHT 64) Counsel did not claim to have formal training in psychiatry but did have a minor in sociology and psychology in college. Id. Petitioner never indicated to counsel that he had any emotional or mental problem.

(PCHT 57) As to past drug use, petitioner stated he never used the stuff and was smart enough to avoid it. Id.

Petitioner's counsel emphasized that the evaluation was at the request of former counsel who were only briefly in the case. (PCHT 58) When petitioner went down for the psychiatric evaluation at Dorothea Dix, counsel did not feel that there was any problem. (PCHT 63) Counsel saw no need for further evaluation because it appeared that petitioner was speaking with reason and logic and knew what he was doing. (PCHT 64-65) He found that petitioner was not "an emotional con artist." Id.

After petitioner stated he desired the death penalty, counsel did not request additional psychiatric evaluation because he found that petitioner appeared to be competent and the decision was based on petitioner's life philosophy, which was not unreasonable but rather was well thought out. (PCHT 61-62) Counsel had great respect for petitioner's religious and philosophical beliefs which led him to make the decision.

In addition, counsel had tape recordings of his discussions with petitioner. (PCHT 179-203)-Attachment to Pl. No. 29. In these discussions, it is clear that petitioner's major concern was to avoid a conviction. A conviction would violate his life philosophy because it would result in his being locked up in prison. He indicated that the killing was done deliberately simply to avoid being caught. (PCHT 200) He relates that he would likely kill again if released and put in that same situation. His only remorse was that the older Shinn (Buren) did not die so Shinn could

not have identified him. Petitioner also described his life as a youth which indicates disagreement with his family and the beginning of a life of crime, and lack of concern for other human beings, which continued up until the murder. (PCHT 194-99)

The tape recording further reveals petitioner's focused desire for an acquittal so he could continue his life of crime. If he were convicted, he wanted to die because he did not want to live in prison where he could not have money, power and women. (PCHT 185-86; 193-94) Petitioner relates that he has always had larceny in his blood and the only reason he steals is that he cannot get enough money to get all of the things that he wants and that if released, he would continue with this life. Id. In prison, he felt he would lead essentially a useless life, and also he had a belief that everyone has to die some time and that quality of life counts more than the quantity. (PCHT 183-84) Also, there was some thought about reincarnation. (PCHT 185)

Turning to the legal contentions, petitioner raises two main claims. First, he appears to argue in Claims III and VII that the proper procedure was not followed with respect to his competency. He assumes that he waived the reliable sentencing hearing by his actions and that the court and his own attorney erred in failing to take steps to look into his competency and hold a hearing. In Claim II, petitioner simply alleges that he was not competent at the time of his trial. Petitioner dresses his claim of incompetency in a variety of different garments. Thus, even though the record shows that petitioner indicated he understood his rights

and wished his attorney to procure the death penalty, petitioner now argues that he was incompetent to waive his rights.

The Court will start its review with the issue of waiver. A person may not waive the right to stand trial if he is incompetent. Bundy v. Dugger, 816 F.2d 564 (11th Cir.), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.d 149 (1987). Therefore, the fact that petitioner restricted his attorney's presentation of evidence at the sentencing hearing and made the statement to the jury that he desired death cannot be construed as a valid waiver if petitioner were incompetent. Thus, categorizing petitioner's actions as a waiver does not help to advance the analysis.

The next issue is whether a different standard is to be applied because petitioner attempted to truncate or forego legal proceedings in a death penalty case. In that context, the standard for evaluating such cases was set forth in Rees v. Peyton, 384 U.S. 312, 314, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966). There, the Supreme Court determined the test was whether the petitioner "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Id. In contrast, the test with respect to whether an individual is simply competent to proceed at trial has been stated by the Supreme Court in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) to be "whether [petitioner] has sufficient present ability to consult with his lawyer with a reasonable degree

of rational understanding--and whether he has a rational as well as a factual understanding of the proceedings against him."[4]

Notwithstanding the different phraseology between the Dusky and Rees standards, it has been determined that the differences are merely semantic. As stated in Giarratano v. Procunier, 891 F.2d 483, 487 (4th Cir. 1989), cert. denied, ____ U.S. ____, 111 S.Ct. 222, 112 L.Ed.2d 178 (1990):

> Actually there is no substantive difference between the two standards. Both seek to assure that one charged with crime will not be tried or punished unless he has the mental capacity to understand the situation that confronts him and the ability to consult rationally with his counsel about his defense.

Therefore, whether the issue is examined as petitioner's competency vel non or his competency to waive rights at the death sentencing proceeding amounts to simply whether he could understand the situation and reasonably consult with defense counsel.

Next, the Court will explore whether the state court attorney should have made a motion for a competency hearing or the judge sua sponte should have conducted a competency hearing. This issue is distinct from the issue of whether defendant was, in fact, competent to stand trial. Card v. Dugger, 911 F.2d 1494, 1518 (11th Cir. 1990); Fallada v. Dugger, 819 F.2d at 1567-68 n.1; Enriquez v. Procunier, 752 F.2d 111, 114 (5th Cir. 1984), cert. denied, 471 U.S. 1126, 105 S.Ct. 2658, 86 L.Ed.2d 274 (1985). The

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[4] In contrast, in order to execute a person, the court need only determine whether petitioner can understand the nature and purpose of punishment. There is no requirement of an ability to assist counsel. Rector v. Clark, 923 F.2d 570, 572-73 (8th Cir. 1991), cert. denied, ____ U.S. ____, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991).

issue of competency vel non, as opposed to whether proper procedures were employed, may be raised even when a bona fide doubt of competency was not raised at trial and in addition, the burden on the defendant is substantially higher. Fallada v. Dugger, 819 F.2d at 1567-68 n.1; Card v. Dugger, 911 F.2d at 1518; Enriquez v. Procunier, 752 F.2d at 114.

Turning first to the issue of failure to observe procedures adequate to protect a defendant from being tried or convicted while incompetent, such dereliction deprives a defendant of due process of law. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. at 384-86; Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991); Fallada v. Dugger, 819 F.2d at 1568. The trial court is required to convene a competency hearing sua sponte whenever sufficient evidence comes to its attention creating a bona fide doubt concerning the defendant's competence to stand trial. Coleman v. Saffle, 912 F.2d 1217, 1224 (10th Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 22, 111 L.Ed.2d 834 (1990); Flugence v. Butler, 848 F.2d 77, 79 (5th Cir. 1988). A hearing must be convened if the evidence at the trial or immediately related proceedings raises a substantial or bona fide doubt of defendant's competency. McInerney v. Puckett, 919 F.2d 350, 351 (5th Cir. 1990); Hernandez v. Ylst, 930 F.2d at 716. Should the trial court ignore a bona fide doubt and fail to convene a hearing, a nunc pro tunc competency hearing must be convened if possible or else the conviction set aside. Fallada v. Dugger, 819 F.2d at 1568.

In reviewing a case where the trial judge failed to convene a competency hearing, the reviewing court must determine whether a reasonable trial judge should have experienced a bona fide doubt as to petitioner's competency. Hernandez v. Ylst, 930 F.2d at 716. The test to be employed is an objective one. Id. The issue is whether the objective facts which were known by the trial judge were sufficient to raise a bona fide doubt as to petitioner's competency. Fallada v. Dugger, 819 F.2d at 1568; Flugence v. Butler, 848 F.2d at 79.

The significant historical facts relevant to determine whether there was evidence of a bona fide doubt as to petitioner's competency requires consideration of three factors: (1) historical evidence of mental illness; (2) substantial evidence of mental incompetence at or near the time of the hearing supported by medical opinions; and (3) petitioner's demeanor at trial and evidence of irrational behavior. Card v. Dugger, 911 F.2d at 1518; Flugence v. Butler, 848 F.2d at 79. Any one of these factors may be sufficient to raise a bona fide doubt, and the information need not be presented in a formal motion or in the form of proper evidence so long as it is fairly before the court. Coleman v. Saffle, 912 F.2d at 1224; Porter v. Estelle, 709 F.2d 944, 949-50 n.3 (5th Cir. 1983), cert. denied, 466 U.S. 984, 104 S.Ct. 2367, 80 L.Ed.2d 838 (1984).

Petitioner has failed to carry his burden. There is no objective evidence which supports petitioner's claim and his merely raising the issue now is simply insufficient. Coleman v. Saffle,

912 F.2d at 1226. Here, there is no history of prior mental illness in the past, much less near the time of the trial. To the contrary, petitioner was evaluated for competency and found competent to stand trial. While petitioner submits the affidavit of Dr. Royal who questions that finding, Dr. Royal's affidavit was not before the state trial judge at that time and, therefore, is irrelevant to the inquiry. Hernandez v. Ylst, 930 F.2d 718; Porter v. Estelle, 709 F.2d at 953.

Nor does petitioner show any evidence of bizarre behavior or activity at trial which raised any indication that petitioner was incompetent. Petitioner attempts to assert that his decision to not fight the death penalty constituted bizarre behavior raising a bona fide doubt about his competency. However, this contention may be rejected. As the state argues, the mere fact, that a defendant requests the death penalty if he is convicted or decides not to fight the death penalty, does not demonstrate incompetence or bizarre behavior in the sense that petitioner is incompetent or mentally deficient. Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988); Streetman v. Lynaugh, 835 F.2d 1521 (5th Cir. 1988); Autry v. McKaskle, 727 F.2d 358 (5th Cir.), cert. denied, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984); and see also Balfour v. Haws, 892 F.2d 556 (7th Cir. 1989).

In the instant case, upon reviewing the post-conviction hearing transcript and petitioner's statements to counsel, it is clear that petitioner, like the one in Byrne, may appear to

demonstrate extreme callousness and lack of remorse, but this is not the equivalent of an underlying mental disorder. Byrne v. Butler, 845 F.2d at 513. Nor, is a competency hearing required simply because a client prohibits his attorney from taking actions which would avoid the risk of a death sentence. Streetman v. Lynaugh, 835 F.2d at 1525 n.13.

In the instant case, petitioner's decision to request the death penalty from the jury and to restrict counsel's actions at the sentencing hearing came from a well thought out, knowing and deliberate decision on his part. The record shows that counsel and petitioner reviewed the situation thoroughly and that petitioner's decision was not a spur of the moment one but rather an intelligent and deliberate choice consistent with petitioner's life philosophy. Present counsel's argument, premised on the view that the preservation of life at any cost, under any circumstance, constitutes the highest life principle, is a matter which the greatest philosophers and theologians have debated. Autry v. McKaskle, 727 F.2d at 363.

Not only does petitioner's request for the death penalty not constitute evidence of his incompetence, but the evidence in this case positively supports a contrary conclusion. Here, we have an individual who committed two extremely callous acts and had no sign of remorse. The evidence shows petitioner to be a person who is quite well able to look after himself and tends to put himself first in most situations. His decision not to live life, unless he could live it as he desired, is consistent with his philosophical

outlook and indicates that he was taking very good care of himself using his own standards. While others might not share those standards, neither would they act on those standards in the way which caused petitioner to commit the acts that he did.

The record does not show that petitioner sunk into a pit of despondency or helplessness. Rather, the case against petitioner was extremely strong. Yet he continued to urge his attorney to fight for the purpose of avoiding the conviction. (PCHT 168, 179-83) Petitioner feared incarceration and already had some experience with it. It was only the thought of long years of imprisonment that prompted the request for the death penalty.

Petitioner's counsel criticizes the trial judge for not conducting a more in-depth hearing at the sentencing phase when petitioner elected to request the death penalty. However, there was no evidence at any time which would indicate petitioner was incompetent. The court is entitled to rely on the failure of counsel to file a motion. Coleman v. Saffle, 912 F.2d at 1226. While petitioner's request for death cannot be termed a bizarre statement, even bizarre statements do not mandate a competency hearing. Hernandez v. Ylst, 930 F.2d at 718. The fact that neither the trial judge, the state's attorney, nor petitioner's own attorney, perceived any issue concerning petitioner's competency constitutes a good and significant reason to find lack of merit to a competency claim. Hernandez v. Ylst, 930 F.2d at 716. Petitioner's constitutional rights were not infringed by the

failure to hold a competency hearing at any time during the guilt or sentencing phase of the trial.

The Court further finds for the same reasons that petitioner's claim that his trial counsel was ineffective for failing to request a psychiatrist or move for a competency examination is likewise frivolous. As with the trial judge, in order to succeed on a claim that the attorney rendered ineffective representation by failing to act on issues of petitioner's competency, the petitioner must show that the attorney had some indication that there was some mental impairment. Byrne v. Butler, 845 F.2d at 513; Enriquez v. Procunier, 752 F.2d at 114. Petitioner's counsel talks about the attorney's ethical duty to "educate" petitioner to abandon his own life philosophy and accept a new one now advanced. This argument stretches too far and both denigrates and exaggerates the role of counsel. Counsel is not to impose his will and philosophy on his client but to provide representation within the ethics of the profession. Therefore, once a petitioner knowingly makes a decision and is not incompetent, the attorney has an ethical duty to comply with those wishes. Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986)(counsel's suggestion to jury that life imprisonment unbearable and requesting a sentence of death); Autry v. McKaskle, 727 F.2d at 362 (instruction not to argue against death penalty).

Petitioner clearly understood the significance of the situation before him and was able to consult with and use counsel. In fact, petitioner's attorney stated that petitioner is perhaps one of the most intelligent and aware clients that he has had the

opportunity to represent. (PCHT 64) Counsel cannot be faulted in not moving for a competency hearing during the trial or sentencing.

Finally, the Court will examine petitioner's claim that at the time of the trial he was incompetent and he is entitled to an evidentiary hearing and the appointment of a psychiatric expert. As stated earlier, a challenge to competency vel non imposes a different issue than whether petitioner should have had a competency hearing. The determination of this latter issue is based on the evidence available at the time of trial. The issue of competency vel non is not so restricted and the court may consider post-trial evidence. Card v. Dugger, 911 F.2d at 1519-20. Notwithstanding, the burden upon petitioner to demonstrate incompetency is an extremely heavy one. Flugence v. Butler, 848 F.2d at 79; Card v. Dugger, 911 F.2d at 1519; United States ex rel. Lewis v. Lane, 822 F.2d 703, 706 (7th Cir. 1987); Porter v. Estelle, 709 F.2d at 949-50 n.3.

Petitioner is not entitled to an evidentiary hearing unless he can present clear and convincing evidence which creates a real, substantial, legitimate doubt as to petitioner's mental capacity and ability to assist counsel. The facts must both be positive and unequivocal. Bundy v. Dugger, 816 F.2d 564. In order to meet this standard, it has been suggested that petitioner present "a history of mental illness, substantial evidence of mental incompetence at or near the time of the trial supported by the opinions of qualified physicians and the testimony of laymen." Flugence v. Butler, 848 F.2d at 79 (quoting Bruce v. Estelle, 483 F.2d 1031,

1043 (5th Cir. 1973)). Should petitioner clear this hurdle, then an evidentiary hearing would be convened where he may prove his incompetence at the time of trial by a preponderance of the evidence. Porter v. Estelle, 709 F.2d at 949-50 n.3.

In the instant case, petitioner fails to present clear and convincing evidence of positive and unequivocal facts which generate a real, substantial and legitimate doubt as to his mental capacity. Petitioner relies on Dr. Royal's affidavit which will now be compared to the Dorothea Dix competency report.

Dr. Royal bases his conclusion of incompetency on petitioner's unhappy childhood and lack of adjustment to it. He discounts the finding of competency made by Dorothea Dix at the time of petitioner's trial for failing to develop or assess petitioner's social history. Dr. Royal recounts petitioner's failure to establish relationships with his parents and women as creating in petitioner a macho view of the world. Petitioner suppresses his emotions and tries to act as if he can control all situations. This view allegedly resulted in a lack of capacity to understand his options at the sentencing phase of the trial. However, the Dorothea Dix examiners also had knowledge of petitioner's unsatisfactory childhood, suicide attempt and macho image. They just evaluated the factors differently than Dr. Royal did.

Dr. Royal also indicates that petitioner may have had a drug problem which led to his committing the crime. However, the post-conviction hearing shows that petitioner was a career criminal. His friend Phyllis Soden, and his girlfriend Lisa Green

reported petitioner did not use drugs. Petitioner said as much to his attorney and to the people at Dorothea Dix, although the medical reports seem to note rare usage.

If Dr. Royal's affidavit had raised any question of doubt concerning petitioner's competency, the Court would have appointed Dr. Royal to conduct further examination for purposes of conducting an evidentiary hearing. However, even considering the affidavit, there is no substantial evidence of doubt concerning petitioner's competency, much less clear, unequivocal facts which are clear and convincing.

In Enriquez v. Procunier, 752 F.2d at 114, a letter from a physician suggested the defendant may be incompetent. However, the court found this was more than offset by the report of the state psychiatrist and the trial court's and defense counsel's observations. The same is true here. Indeed, aside from Dr. Royal's opinion, made some years after the trial, this case does not even have other factors, such as a history of mental problems or bizarre behavior. Even as to those factors, other courts have found they did not raise a substantial doubt as to competency. Flugence v. Butler, 848 F.2d at 80 (outburst and invocations of the Deity and subsequent diagnosis of paranoid schizophrenia); Bowden v. Francis, 733 F.2d 740, 748 (11th Cir. 1984), reaff'd, 767 F.2d 761 (11th Cir. 1985); Balfour v. Haws, 892 F.2d 556; Fallada v. Dugger, 819 F.2d 1564 (medication); contrast, Smith v. Freeman, 892 F.2d 331 (3d Cir. 1989)(opinion of mental problems at time of trial and misrepresentation by trial attorney).

Here, Dr. Royal's affidavit and opinion of incompetency, while themselves positive and unequivocal, are overshadowed by the record of competency established at the time of the trial. The Court finds that the record conclusively establishes that petitioner had the mental capacity to understand the situation facing him and the clear ability to consult rationally with his counsel about his defense. There is no evidence suggesting otherwise at the time of the trial nor has the additional evidence forecast by petitioner created a substantial issue which would necessitate an evidentiary hearing.

Consequently, the Court finds that pursuant to 18 U.S.C. § 4241 there is no reasonable cause to believe that the defendant was or is incompetent for purposes of appointment of a psychiatric expert or to require an examination of him. Streetman v. Lynaugh, 835 F.2d 1521 (allegations of childhood injury, drug use and description as atypical paranoid state, delusional ideation and inappropriate behavior). Therefore, it is determined that petitioner's Claims II, III, and ¶¶ 110 and 111 of Claim VII should be dismissed and petitioner's request for appointment of a psychiatric expert and evidentiary hearing on the issue of competency denied.

Claims IV, V, and VI - Challenges to the Sentencing Hearing

In Claims IV through VI, petitioner complains about his sentencing hearing. In Claim IV, petitioner alleges that he did not knowingly, voluntarily and intelligently waive his right to a reliable sentencing determination. In Claim V, he claims he did

not waive his right to counsel during the sentencing phase. In Claim VI, he alleges that his sentence was determined in absence of a reliable sentencing hearing.

The factual basis for these claims essentially arises out of petitioner's assumption that he was incompetent at the time of the sentencing hearing because he restricted his attorney at the sentencing phase by requesting that the jury sentence him to die if they thought he was guilty.

In support of his claims, petitioner makes a host of charges and allegations relating to whether his decisions at sentencing were knowingly, voluntarily, and intelligently made. He faults the state court for failing to establish that petitioner understood the function of the capital sentencing hearing and mitigation and for failing to inquire into petitioner's competency. This last matter has been discussed and rejected previously.

Petitioner next alleges that he did not comprehend the nature or function of mitigating evidence and if he had and counsel properly investigated the matter, he would have received a life sentence. He faults his attorney for conducting the voir dire hearing at sentencing in order to establish on the record that petitioner wished to challenge the jury to give him a death sentence if they found that he committed the crime. Petitioner concludes that his court appointed attorney was so deficient that he did not even act as an attorney and gave him inaccurate sentencing advice and defaulted on his obligations as counsel. Petitioner contends he had to act as his own counsel. Petitioner

premises the claim on the alleged unique circumstances of the case and his psychological profile, all of which indicate he was incompetent to waive counsel during the sentencing hearing. Again, the competency basis for this claim has been discussed and rejected previously.

Finally, petitioner claims the sentencing hearing was unreliable because trial counsel unreasonably agreed to represent petitioner's "incompetent" request to die. (While not stated in Claim VI, elsewhere petitioner implies that counsel had a duty to "educate" him on the merits of life imprisonment over the death penalty.) The Court likewise finds these claims without merit for reasons previously discussed in the competency section of the Recommendation.

Petitioner would attempt to analogize the situation at sentencing with the normal guilty plea in a criminal case. While the Court finds the analogy not very appropriate, it will be helpful to discuss the law as to guilty pleas and waiver for a better understanding of the claim's lack of merit.

A guilty plea must be knowingly, voluntarily and intelligently made. Voluntariness is satisfied when a defendant has adequate notice of the offense and the constitutional protection he is waiving. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). With respect to knowledge, when a defendant is represented by an attorney, the court need not conduct an explicit inquiry but may presume that defense counsel routinely explains the nature of the offense so that the defendant understands his

admissions. Harrison v. Warden, Maryland Penitentiary, 890 F.2d 676 (4th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 1951, 109 L.Ed.2d 314 (1990).

In a guilty plea situation, a defendant is foreclosed from attacking the admissions made at the plea hearing. His admissions may be accepted as conclusive unless he presents reasons for not so concluding. Normally, the defendant may only attack the voluntary, knowing and intelligent character of his plea by showing ineffective assistance of counsel. Via v. Superintendent, Powhatan Correctional Ctr., 643 F.2d 167 (4th Cir. 1981). In this situation, the Court uses the Strickland standard for prejudice. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Thus, the Court must determine that but for counsel's errors the petitioner would have pled not guilty and insisted on a trial. Furthermore, a guilty plea breaks the chain of preceding events. Therefore, defendant may not raise independent claims of constitutional deprivations occurring prior to the plea but only the voluntary, knowing and intelligent character of the plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

In examining a guilty plea, the Court may accord great weight to the statements made on the record by a defendant. This is especially true when made under penalty of perjury and such statements carry a strong presumption of verity and erect an imposing barrier against collateral attack. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, at

a minimum, a defendant must provide a reasonable explanation for inconsistencies. Via v. Superintendent, Powhatan Correctional Ctr., 643 F.2d at 171. If he claims attorney misadvice, he must allege facts sufficient to show that but for the "misadvice," he would have pled not guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. at 60. Mere allegations of prejudice are insufficient. Key v. United States, 806 F.2d 133, 138 (7th Cir. 1986); United States v. Giardino, 797 F.2d 30, 32 (1st Cir. 1986).

In the instant case, using the guilty plea analogy, petitioner fails to meet this heavy burden. The linchpin of the claim arises out of his contention that he was incompetent at the time of sentencing. However, as decided previously, there is no substantial evidence giving any indication that this was the case. Instead, the record discloses that petitioner was well aware of his options. As demonstrated at the post-conviction hearing with the playing of one of the taped conversations between petitioner and his attorney (PCHT 179-204), petitioner was well aware of his options and the attorney's advice to present mitigating evidence. However, petitioner decided on a strategy to force the jury to make the hard decision of recommending death by making them question whether they were truly convinced that he in fact was guilty. Petitioner never requested that the jury simply recommend putting him to death. Instead, his statement was that if they thought he did it, then they should gas him.

This decision by petitioner was not made on the spur of the moment but in fact was a long standing life outlook which he had as

part of his belief system. Petitioner found it hard to believe that Buren Shinn lived after he shot him at close range and could not believe that his girlfriend "betrayed" him by turning state's evidence. A reading of his conversations with counsel (PCHT 174-204) indicates that he thought he had gotten away with the crime and found it difficult to accept that he might be convicted. This partially appeared to be his basis for challenging the jury as he did. Second, he did not want to spend a lifelong time in prison which he considered to be an unconscionable waste of life in violation of his life principles. (PCHT 184) Petitioner adopted a "keep people guessing" strategy. (PCHT 183) He directed his defense and the evidence shows his decisions were voluntarily, knowingly and intelligently made. He does not offer a reasonable explanation to conclude otherwise.

Petitioner now states that his attorney made an error by suggesting that if he were found guilty and were not put to death that he could receive a combined sentence of 180 years and this exaggerated the amount of time that petitioner could receive. (PCHT 180) However, the same Transcript shows that petitioner did not make his plans based on a 180-year sentence because he responded that he doubted that he could live 180 years. (PCHT 184) Rather, he was worried about even a 30-year sentence, stating that he would get out as an old man and would have wasted the prime of his life. (PCHT 193) The attorney's misadvice was not the basis for petitioner's actions.

Petitioner did not waive his sentencing hearing or his right to counsel, nor did counsel abandon him. The record before the state court (Tr. 759) shows that the trial court adequately determined that petitioner understood the sentencing procedure and had no questions about it, that he spoke to his attorney at least on five separate occasions, had thought about this for months, and made his own decision. The trial court made sufficient inquiry to find petitioner was making a voluntary, knowledgeable and intelligent choice.

The fact that petitioner's attorney acceded to petitioner's wishes in no way can be construed as an abandonment. Rather, his actions were akin to the retreat in Clozza v. Murray, 913 F.2d 1090 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991), where counsel made such concessions as were appropriate by the evidence. In view of the extremely strong evidence of guilt and petitioner's desire to challenge the jury and his distaste for a long prison sentence, counsel's conduct could not be described as one of abandonment. Indeed, the strategy tended to play on the jury's reasonable apprehension of making a mistake. (Tr. 1025-1028)

This decision is further supported by the findings of the state court in ruling on the motion for appropriate relief. State court findings are presumed to be correct and entitled to deference. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The trial court found that the attorney made an attempt to put in mitigating evidence in spite of petitioner's

instructions, that petitioner failed to show there was any relevant mitigating evidence not used, and the hearing was "constitutionally adequate to establish a basis for a reliable decision." State Court Order of July 1, 1987, at 12.

Petitioner's claims fail to show that he did not knowingly, intelligently and voluntarily make his decisions, that his decisions were uninformed or otherwise pressured or invalid, or that he was abandoned by his attorney. Therefore, petitioner's claims should be dismissed.

Claim VII - Ineffective Assistance of Counsel

Plaintiff raises five categories of ineffective assistance of counsel claims. Each one contains numerous points. Four of the contentions concern counsel's performance during trial. The final one involves counsel's handling of the appeal.

Before addressing the specific points, it will be helpful to discuss the legal standards applicable to trial errors. Petitioner must satisfy the two-prong standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show that the representation fell below objective standards of reasonableness. Second, he must show that as a result, petitioner suffered prejudice, meaning there is a reasonable probability that but for the error in the proceedings, the result would have been different. The Court indulges a strong presumption in favor of counsel's adequacy. Id. It may not second-guess strategic decisions made by the attorney and his client. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

In evaluating strategic decisions, the Court determines whether they are reasonable under all of the circumstances, not just with respect to the trial. The issue is whether the attorney is functioning as counsel. Williams v. Kelly, 816 F.2d 939 (4th Cir. 1987)(failure to move to strike or dismiss). The sixth amendment requires the attorney to act as a professional. Therefore, the attorney may not assist a client to present perjury. Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Some decisions, such as advice not to testify, are examples of those kinds of tactical decisions which may not be challenged so long as there is no coercion by the attorney. Hutchins v. Garrison, 724 F.2d 1425, 1436 (4th Cir. 1983), cert. denied, 464 U.S. 1065, 104 S.Ct. 750, 79 L.Ed.2d 207 (1984). Utilizing these parameters, the Court will examine the allegations of error, pretrial and at trial.

VII-A Pretrial Investigation

Petitioner alleges that his attorney committed error in the pretrial investigation, preparation and motion practice of the case. With respect to the investigation, petitioner claims that defense counsel failed to contact relatives, including his mother and father, and friends who could provide significant background information and character evidence for the trial and sentencing.

The affidavits of these witnesses are provided for the first time. None of these affiants appeared at petitioner's state post-conviction hearing. Petitioner fails to show good cause for this deficiency. Turning to the affidavits, there is no reason

petitioner's attorney should have known about any of them except Emily Long, who states that she attempted to contact petitioner's attorney, Jim Johnson. These people would purportedly be character witnesses saying that petitioner was helpful and honest, good at work, etc.

This issue was addressed at petitioner's state post-conviction relief hearing. There, the error was denominated as a failing to present mitigating evidence. At the hearing, it was revealed that petitioner's attorney, Mr. Jim Johnson, had practiced for eighteen years and was assisted by an associate who worked with him for seven years. Mr. Johnson was an extremely experienced criminal trial practitioner. (PCHT 131-33) Because of petitioner's elected trial strategy, he told his attorney he did not want his relatives to be called as witnesses. (PCHT 55) He further told his attorney that he was not close to anyone, including his parents, and this was because if he did anything illegal, it could create problems for him. (PCHT 54-59) (Petitioner apparently engaged in stealing as a general way of supporting himself. (PCHT 185))

The attorney conducted his own investigation, finding that petitioner was a private person who liked his own space and did not like to be confined. (PCHT 58) He talked with people who knew petitioner. Petitioner had a reputation for being a loner, a bragger, and a fence for handling stolen goods. (PCHT 59) Petitioner repeatedly told his attorney to either get a not guilty verdict or procure the death penalty. (PCHT 168) The attorney considered mitigating evidence that he could put up which

essentially would only indicate that petitioner was "a pretty good guy." (PCHT 170). He thought about using the parents and the usual sentimentality that goes therewith. However, he knew that negative factors necessarily would arise on cross-examination. (PCHT 170-71) Considering these matters, Mr. Johnson developed his case and attempted to find mitigation evidence in the guilt phase of the trial through cross-examination. (PCHT 65-67, 173, 234-35) He realized that putting on witnesses at sentencing would likely open the door to other problems, particularly when the client has decided to challenge the jury by asking for the death penalty. Id. This strategy does not reveal deficient representation.

The state post-conviction court found that counsel "made extensive investigation into the facts and circumstances" in order to get mitigating evidence, including investigation of petitioner's past. It concluded counsel sufficiently presented mitigating evidence to the jury to make the sentencing hearing adequate and that counsel was not ineffective. This Court is not bound by that ultimate determination because competence of counsel claims are mixed questions of law and fact. Knight v. Johnson, 699 F.2d 162 (4th Cir.), cert. denied, 464 U.S. 832, 104 S.Ct. 112, 78 L.Ed.2d 113 (1983). However, the Court may and does accept the findings of fact. Mason v. Procunier, 748 F.2d 852 (4th Cir. 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1876, 85 L.Ed.2d 168 (1985). The facts do not show deficient representation through inadequate investigation or prejudice to petitioner. Thus, the claim is without merit.

In addition, the state court specifically noted that petitioner failed to show that any mitigating evidence was available. Therefore, he could not show he was entitled to relief. This finding may be accepted. Petitioner fails to show that the state hearing on this issue was not full and fair and that he should be allowed to introduce new evidence. But, even when the Court considers these "new evidence" affidavits, petitioner is still not entitled to relief.

Counsel does not necessarily act ineffectively by failing to follow up on all avenues of investigation. See Ballou v. Booker, 777 F.2d 910 (4th Cir. 1985)(defendant admits to crime). Here, counsel is faulted for not checking plaintiff's school records, etc., and friends. However, petitioner indicated that he did not want his people involved. Counsel made an independent investigation to check on petitioner's reputation among people who knew him and found it to be a mixed bag. While petitioner now presents affidavits wherein people point out his good characteristics, counsel was well aware that such witnesses could in fact be damaging through cross-examination. Counsel is also criticized for failing to "educate" petitioner as to the importance of developing a social history, but that matter has been discussed and rejected previously. Finally, the claim that counsel failed to locate documentary evidence of "past psychological records, school records, social service records and other records" is conclusory. Considering all of these circumstances, it cannot be said that counsel failed to make an adequate investigation even if one were

to consider the new affidavits. Counsel did make an investigation and came forward with much of the same type of evidence as is presented now. He decided not to use it, which was appropriate since witnesses, while they might be helpful, could also hurt the case. Tompa v. Commonwealth of Virginia, 331 F.2d 552 (4th Cir. 1964). For example, petitioner points out that one witness indicated petitioner was rarely without his glasses, yet the composite photo of the suspect prepared by the police did not show glasses. First, there was no question but that petitioner committed the crime in this case. Second, as respondent points out, pursuing such evidence may have provided explanation for Mr. Shinn's testimony that his assailant kept blinking his eyes. (Tr. 606) In conclusion, petitioner fails to establish either counsel errors or a likelihood of prejudice.

Turning to the motion part of the trial, petitioner claims that counsel failed to move for the appointment of a psychiatrist. This has been rejected previously and will not be discussed further. Next, petitioner alleges that counsel was ineffective for failing to make a motion for the appointment of an investigator to assist him. The claim is conclusory. O'Bremski v. Maass, 915 F.2d 418 (9th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 986, 112 L.Ed.2d 1070 (1991); Riley v. Lockhart, 726 F.2d 421 (8th Cir. 1984). It is true that petitioner was contemplating a perjured alibi defense (PCHT 162-64) but the attorney of course could not use the investigator for that purpose. The attorney had already discovered the same type of sentencing mitigation evidence

petitioner now presents to the Court. Counsel made his own investigation for the change of venue motion and did not need an investigator as was revealed at the state post-conviction hearing and will be discussed later. Petitioner fails to show the counsel's decisions constituted error or that he was prejudiced.

VII-B Jury Selection

Petitioner faults his counsel during the jury selection voir dire with respect to issues of pretrial publicity, and the jury's understanding of the reasonable doubt standard, and its ability to consider life imprisonment and background information.

Petitioner contends that counsel failed to effectively inquire of the jurors as to the extent of their exposure to pretrial publicity. (emphasis added) Counsel allegedly failed to ask probing background questions designed to uncover prejudice and the jurors' understanding and acceptance of the concepts of "burden of proof" and "reasonable doubt." (emphasis added) Next, petitioner alleges that counsel's questions to the jurors concerning the death penalty were inadequate to obtain their views, that he failed to question jurors individually about the death penalty, and failed to see whether they could vote for a life sentence or understood the concepts of mitigation and parole.

Counsel is also faulted for not examining the jury and correcting misconceptions it might have about parole eligibility. Petitioner alleges that counsel failed to challenge for cause,

jurors who asserted the death penalty should be automatic.[5] Petitioner scores counsel for not using up all of his peremptory challenges in order to preserve claims concerning the death qualification of the jurors and change of venue issues. Finally, he complains that counsel distanced himself from petitioner.

A review of the jury voir dire fails to substantiate petitioner's claims. His assertion that the attorney tried to distance himself by stating that he had a difficult thing to do by representing the defendant is inaccurate and taken out of context. (JS** 68) A review of the record indicates that counsel merely emphasized the difficult nature of the task involved for all participants.

The suggestion that counsel should have exercised all his peremptory challenges to preserve the issue for appeal also is frivolous. At the state post-conviction hearing, the experienced trial counsel explained that one does not run out your jurors with peremptory challenges when he is satisfied with the jury. (PCHT 208-209) Petitioner's contention might be effective appellate strategy but it is also unsound trial advocacy. As for the other claims, which concern the questions posed to the jury, they are

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[5] Petitioner failed to provide a transcript cite for paragraph 120 in which this allegation is made. The Court ordered petitioner to provide additional transcript citations for matters which he wished the Court to consider in his petition. Petitioner filed a supplement on September 23, 1991. It did not contain a transcript citation for this paragraph. He has not otherwise directed the Court to the record. Therefore, the Court will not consider the issue further. It may be noted that a similar contention was rejected in Stamper v. Muncie, 944 F.2d 170 (4th Cir. 1991).

** Jury Selection Transcript.

speculative and conclusory and, therefore, without merit. O'Bremski v. Maass, 925 F.2d 418; Riley v. Lockhart, 726 F.2d 421. Petitioner does not show either cause or prejudice as to any of them.

VII-C Guilt Phase

Petitioner's claims concerning matters during the guilt phase are wholly without merit. As revealed during the state post-conviction hearing, petitioner had attempted to procure a perjurious alibi defense but counsel would not allow it. The evidence of petitioner's guilt was and is clear. Against this backdrop, petitioner now faults counsel for failing to make an opening statement to the jury, failing to cross-examine Phyllis Soden, petitioner's girlfriend, in an effective manner, and for failing to object to the identification procedure with respect to petitioner's automobile. Finally, counsel is scored for failing to object to the prosecutor's closing arguments.

The allegations concerning the failure to make an opening statement and inadequate cross-examination do not merit relief absent petitioner showing that the result would have been different. Sawyer v. Butler, 848 F.2d 582, 590 (5th Cir. 1988), aff'd en banc, 881 F.2d 1273 (5th Cir. 1989), aff'd on other grounds, ____ U.S. ____, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Sawyer involved a case where counsel waived closing argument. Here, counsel only waived opening argument and in light of the overwhelming evidence, petitioner cannot show that an opening statement would have changed the result.

The cross-examination of Phyllis Soden is said to be ineffective for failing to explore a prior somewhat inconsistent statement. However, the matter was covered on direct examination. (Tr. 389-93) Her later statement was the subject of cross-examination. (Tr. 424-26) In any event, the statement was evidently placed into evidence (Tr. 555-56) and one discrepancy was noted (Tr. 567). Additionally, in light of the strong evidence of guilt, petitioner cannot show prejudice.

Next, petitioner alleges that counsel should have objected to the impermissibly suggestive identification procedures employed by law enforcement officers with respect to witness Joy Cline's identifying petitioner's car. Petitioner points out that Cline indicated, that before she went to an impound lot to view petitioner's car, an officer showed her a picture of petitioner's car and said it belonged to petitioner. (Tr. 323) Petitioner alleges that counsel should have requested an identification hearing to exclude the identification based on factors such as opportunity to view, the witness' degree of attention, accuracy of prior description, level of certainty and the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

The Fourth Circuit has determined that Wade type challenges do not apply to identification of objects such as motor vehicles as opposed to persons. Inge v. Procunier, 758 F.2d 1010 (4th Cir.),

cert. denied, 474 U.S. 833, 106 S.Ct. 104, 88 L.Ed.2d 85 (1985). In any event, petitioner could not show prejudice. It is obvious the witness had a clear picture of the car in her mind. She knew its color, the fact that it had a dirt spot, that a white male with a beard was driving it, and that it had a bumper sticker on the back. (Tr. 308-25) She was the one who contacted law enforcement officers after seeing the evening news. While the officer showed her a black and white photograph of petitioner's car, he did not say it was the car used by the murderer but only that he wanted to see if she could identify it as the one that had tried to run her off the road around the time and place of the murder. (Tr. 323) Under these circumstances, petitioner's counsel cross-examined as effectively as possible. (Tr. 316-325) Petitioner also cannot show prejudice.

Finally, petitioner criticizes counsel for not objecting to allegedly unconstitutional statements by the prosecutor. These are:

(1) expression of personal belief in petitioner's guilt by rhetorically saying after the reading of each of the three charges, "and I say to you of that he is guilty" (Tr. 943);

(2) the statement that after petitioner had been targeted as a possible defendant, he allowed law enforcement officers take his photograph and then bragged to his girlfriend that he could not be identified because the elder Shinn, if not dead, was then at least a vegetable, and the

prosecutor commented about the "gall" of petitioner's "cooperation" at that time (Tr. 963);

(3) that Wayne Shinn's house was not his castle but rather "his crucifixion block" (Tr. 981);

(4) that he was a little sickened to think that defendants are tried "in the beautiful courtroom like this and their victims are shot down and lay in their own blood and vomit on some ground somewhere" (Tr. 981); and,

(5) that only the jury could vote on a defendant's guilt and in effect, asked them "why don't they do something about it?" (Tr. 989)

At the post-conviction hearing, counsel indicated he did not object to the prosecutor's argument because when prosecutors get really cranked up, it often hurts them rather than helps them. (PCHT 206) He did not want to get into a situation of each side making objections so that he might argue also without interruption. (PCHT 207) Finally, he knew good arguments from bad arguments and did not think that the jury argument in this case would have resulted in a new trial by order from the North Carolina Supreme Court. Id. It is quite obvious that the attorney made a strategic decision which this Court should be reluctant to second-guess. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

Petitioner fails to show that the argument in this case was so abusive or extravagant so as to justify a new trial under state law. See generally 4 STRONG'S NORTH CAROLINA INDEX 3D Criminal Law

SS 102.6-102.13 (1976). Also, counsel's failure to object did not prejudice petitioner.

In determining whether a prosecutor's argument violates due process and deprives a defendant of a fair trial, the Court must look to see whether he manipulated or misstated evidence or implicated other rights. Darden v. Wainwright, 477 U.S. 168. Here, there is no indication that the remarks violated petitioner's right to a fair trial. The Court may look at the degree the remarks may have misled or prejudiced the jury, whether they were isolated or extensive, the strength of the case, and whether the remarks were deliberate. United States v. Harrison, 716 F.2d 1050 (4th Cir. 1983), cert. denied, 466 U.S. 972, 104 S.Ct. 2345, 80 L.Ed.2d 819 (1984).

The remarks here did not infringe on any particular constitutional right, such as petitioner not taking the witness stand. Some remarks, such as the prosecutor suggesting that petitioner was guilty or that petitioner's feigned cooperation was galling or that only the jury could do something about the situation, are fair comment. The argument that the victim's house was not a castle but his crucifixion block is somewhat colorful and not unexpected in a heated trial involving a passionate cause. The most egregious remark may have been the comment that petitioner was being tried in a nice courtroom. However, that remark was isolated and in no way would have misled the jury from its duty, particularly since it was made in the heat of argument and the case, even at sentencing, was a strong one. Therefore, petitioner

fails to show that counsel violated his duty, much less that petitioner suffered cognizable prejudice.

VII-D Sentencing Phase

Petitioner alleges counsel was ineffective during the sentencing phase of the trial. Some of these matters have already been covered and will not be extensively discussed again. Thus, petitioner now alleges that his counsel (1) abandoned him so that he effectively had to proceed pro se; (2) failed to investigate and develop mitigating evidence and present any evidence at the sentencing phase; and (3) failed to develop evidence to show that petitioner's request was "suicidal" and irrational and argue the presence of mitigating circumstances, including petitioner's incompetency. Finally, counsel is criticized again for not developing psychological evidence of petitioner's incompetency.

The Court has already found that petitioner was not incompetent and that counsel had a duty to represent petitioner and not substitute his own beliefs for that of petitioner. Petitioner's counsel's strategy was to develop whatever mitigating circumstances he could during the guilt phase of the trial. Petitioner, in fact, acknowledges that substantial evidence was developed this way. See Claim I, ¶¶ 38-39. Petitioner sought to challenge the jury with his innocence at sentencing and petitioner's counsel carried forth that strategy as effectively as possible. Hayes v. Lockhart, 852 F.2d 339 (8th Cir. 1988), rev'd on other grounds, 881 F.2d 1451 (8th Cir. 1989)(petitioner's own request). The strategy employed by counsel was in large part

dictated by his client and counsel cannot be faulted for following that strategy. Compare and contrast Card v. Dugger, 911 F.2d 1494. A defendant may not block his lawyer's efforts and then later complain of ineffectiveness. Autry v. McKaskle, 727 F.2d at 361. Petitioner fails to satisfy either prong of the Strickland test.

Next, petitioner objects to counsel's failure to object to six statements made in the sentencing jury arguments. They are:

(1) In anticipating that defense counsel may argue life is precious, the prosecutor asked the jury to "recall that Wayne Shinn found it so." (Tr. 1016)

(2) While petitioner has constitutional rights, a citizen has the right to be free from being assaulted and shot and to be safe in his home. (Tr. 1017)

(3) While defendant had two attorneys, Wayne Shinn "had no attorney sitting next to him." (Tr. 1018)

(4) In explaining why the state only selected two aggravating circumstances, because they were ones found in the statute, the prosecutor asked whether the jury wondered why, when there are so many other facts that made this "such a heinous crime" that the state limited itself to the two statutory circumstances. (Tr. 1013)

(5) In reminding the jury of this country's legal history and respect for law, the prosecutor speculated that in many countries after a murder conviction execution would be summary. (Tr. 1021)

(6) In discussing the death penalty, the prosecutor indicated that "we all agreed that we believe in the death penalty" and then went on to recall how everyone agreed it may not be imposed in all cases but that the circumstances of this case warranted it. (Tr. 1022)

Again, petitioner fails to show that the error in failing to object to the jury arguments was so serious so as to render his counsel's assistance ineffective. The only statement coming close to being so egregious so as to infringe upon a specific constitutional right or mislead the jury would be the comment about petitioner having an attorney but the victim did not. Petitioner fails to show counsel's failure to object was ineffective and would have merited relief under North Carolina law. Even if he did, he fails to meet the prejudice prong of the Strickland v. Washington test. Strickland v. Washington, 466 U.S. 668.

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(en banc), further opinion, 809 F.2d 700 (11th Cir. 1987), the court held that the prejudice standard of the Strickland test was the appropriate one to apply in determining whether prosecutorial argument per se violated the due process clause. The court pointed out that in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the Supreme Court determined that improper prosecutorial argument must be examined in the entire context of the judicial proceeding. The issue is not whether a particular remark is unfair but whether it rendered the entire trial unfair. Therefore, isolated or ambiguous or unintentional remarks will be

viewed with some lenity. Also, curative instructions may mitigate any damage. In Brooks v. Kemp, 762 F.2d at 1401, the court determined that the petitioner must show that there is a reasonable probability that in absence of the improper remarks the result may have been different.

Under the facts of this case, petitioner cannot meet that standard. The evidence of guilt was overwhelming and petitioner decided to challenge the jury at sentencing to give him the death penalty if they did not have a doubt about his guilt. The crime was an aggravated one under the circumstances. It is not unfair for the prosecutor to remind the jury that the killing was an execution style one and that the victim's rights were obliterated by the crime. Brooks v. Kemp, 762 F.2d at 1411. Other remarks were superfluous. The remark concerning the attorney was perhaps best left unsaid, but under the circumstances cannot be said to have deprived petitioner of a fair trial. It was a brief comment and did not seek to criticize petitioner for having an attorney. Rather, it was said in anticipation of rebuttal by petitioner's counsel. It appears to have been an inappropriate, unartful way of indicating that petitioner's attorney would have the final argument.

Petitioner's attorney is faulted for failing to request four instructions. Counsel is faulted for not requesting that the jury could consider sympathy. Petitioner fails to show this instruction reflected the law of North Carolina. In any event, the trial judge instructed the jurors that they might consider any other

circumstance as mitigating and any aspect of defendant's character or reputation or circumstance. (Tr. 788) Petitioner fails to meet either prong of the Strickland test. The same is true with respect to the claim that counsel erred in not requesting instructions on specific non-statutory mitigating circumstances. This is a conclusory claim in addition. Riley v. Lockhart 726 F.2d 421.

Counsel allegedly should have requested that the jury be instructed that it had the option of imposing a life sentence on the basis of mitigating evidence irrespective of their weighing of aggravating and mitigating factors. Petitioner cannot show ineffective assistance of counsel because at least at the time, that was an incorrect statement of North Carolina law. State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982), cert. denied, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982). See also Discussion at Claim XIV, infra. Counsel is also faulted for not requesting that the jurors be informed that they need not be unanimous with respect to any particular mitigating factor in order for each individual to utilize the balancing test. The Court has already determined that the core of this issue may not be retroactively applied. More importantly, the instruction in this case passes constitutional muster. Petitioner fails to meet either prong of the Strickland test.

Finally, petitioner alleges counsel was ineffective for not objecting to the instruction concerning the aggravating circumstance of avoiding or preventing a lawful arrest. The Court finds this claim to be conclusory and speculative and may be denied

on this basis. O'Bremski v. Maass, 915 F.2d 418; Riley v. Lockhart, 726 F.2d 421. As respondent points out, this instruction has been upheld as constitutional in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), and State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981), cert. denied, 456 U.S. 932, 102 S.Ct. 1985, 72 L.Ed.2d 450 (1982). Therefore, petitioner was not under a duty to object to the instruction. Thomas v. Lynaugh, 812 F.2d 225 (5th Cir. 1987), cert. denied, 484 U.S. 842, 108 S.Ct. 132, 98 L.Ed.2d 89 (1987).

Counsel allegedly erred in failing to object to the instruction informing the jury that after they found the aggravating circumstances outweighed the mitigating, that it would be their "duty to recommend that defendant be sentenced to death." (Tr. 784) Such an instruction does not violate either the United States Constitution or the law of North Carolina. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982). Petitioner fails to meet either prong of the Strickland test.

Counsel is last criticized for not requesting an instruction clearly defining the nature, scope and function of mitigation to the penalty phase. This contention is speculative and conclusory and may be dismissed on that basis. O'Bremski v. Maass, 915 F.2d 418; Riley v. Lockhart, 726 F.2d 421. In any event, the trial judge's instructions were more than adequate. (Tr. 780-81) Petitioner, again, fails to sustain his claim.

VII-E Ineffective Representation on Direct Appeal

The due process clause of the fourteenth amendment guarantees effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, an indigent does not have a right to compel his attorney to argue every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). In order to obtain relief, petitioner must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668.

When, as here, counsel is charged with failing to raise an issue on appeal which results in it being procedurally defaulted under state law, the petitioner must then satisfy the cause and prejudice test of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). However, counsel's deliberate decision to present issues in a different way or to weed out weaker arguments in order to emphasize the stronger ones is the antithesis of cause under either the Wainwright or Strickland standards. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Griffen v. Aiken, 775 F.2d 1226 (4th Cir. 1985), cert. denied, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986). Courts should not second-guess the professional judgments of counsel, and a petitioner would also have to show prejudice. Griffen v. Aiken, 775 F.2d 1226. Therefore, the refusal to raise an appellate claim does not give call for any special review. In cases such as the instant one when the evidence is strong and the appellant point is weak to marginal, no error results. Smith v. State of S.C., 882

F.2d 895 (4th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 843, 107 L.Ed.2d 838 (1990).

Utilizing these standards, petitioner is not entitled to relief on some of his claims because he cannot show either cause or prejudice as demonstrated in the previous or subsequent discussions. These claims are the following:

(1) Failure to assert that the aggravating circumstances of avoiding arrest or to escape was vague and over broad (discussed earlier in Claim VII-D).

(2) Failure to raise the denial of the motion for change of venue and special venire (discussed later in Claim X).

(3) Failure to raise a claim that three prospective jurors were excused even though qualified (discussed later in Claim XV).

(4) Failure to raise petitioner's absence from critical stages at the pretrial and trial stage (discussed later in Claim XI).

(5) Failure to brief the issue about Ms. Cline's allegedly impermissible suggestive out-of-court identification of a motor vehicle (discussed earlier in Claim VII-C).

(6) Failure to raise the issue of the trial court's limitations on petitioner's impeachment and/or mitigation evidence (discussed later in Claim XII(2)).

(7) Failure to appeal the deficiencies of the instructions (discussed in Claim VII-D).

(8) Failure to raise the issue of prosecutorial misconduct in sentencing argument (discussed in Claims VII-D and XII).

(9) Failure to raise the issue that the death sentence was disproportionate and the product of passion, prejudice or arbitrary factors in that petitioner was incompetent to waive reliable sentencing hearing because of his "suicidal request" (discussed in Claims II-VI, IX).

These claims which have been or will be discussed do not raise meritorious issues. Even if petitioner could show either cause or deficient representation, he cannot show prejudice.

The other claims simply do not merit relief. Thus, petitioner claims there was insufficient evidence to support the aggravating factor that he committed the murder in order to avoid apprehension. However, the record shows that he killed to avoid apprehension. (Tr. 366, 377)

Petitioner asserts that counsel should have argued that it was error to hold an off-the-record in-chambers conference concerning the cross-examination of decedent's wife, Mrs. Wayne Shinn. However, he fails to disclose any prejudice.

Next, petitioner claims that it was error for counsel not to raise an objection when the decedent's brother, Jerry Shinn, was allowed to state that he told the deputy there had been a robbery or break in at his brother's house from what he was told by his father. (Tr. 81-83) However, even if this statement were inadmissible hearsay, which is doubtful, its admission was not cognizably prejudicial.

Petitioner alleges counsel should have argued that the repeated references by witnesses to his client as "Wild Man" was error. Respondent shows that witnesses volunteered, perhaps seventeen times (Tr. 373-496), that they knew petitioner by the name of Wild Man and so called him. (Answer at 48) The state at one time asked a witness if petitioner had any nicknames. The witness answered it was "Wild Man." (Tr. 507) Cross-examination revealed that other people, who frequented that place of business, also had strange nicknames which did not necessarily mean anything. (Tr. 508) Petitioner was in fact known as "Wild Man." He fails to show that any appeal of the issue had merit, much less that he suffered prejudice by want of appeal.

Next, petitioner alleges counsel should have raised as error, three inappropriate references during witness testimony. First, petitioner's girlfriend, Phyllis Soden, testified that petitioner told her that he was not going back to prison (Tr. 377). Petitioner claims this was error because petitioner never had been to prison and instead, served his time in a county jail. However, the question is what petitioner stated. It was a matter for cross-examination, but more likely was best left alone.

Petitioner objects because Ms. Soden also testified that he may have known something about the law since he had been involved in it. (Tr. 480) Petitioner's objection is merely argumentative, like the prior one.

Last in this series, petitioner claims that it was error when Ms. Soden related how petitioner was happy because he thought that

the father Buren Shinn was a vegetable and his girlfriend was helping him by giving the police hell. He told Ms. Soden that the police wanted him to take a lie detector test but he would not because it caused a heart murmur. (Tr. 394) All of these statements are clearly admissible as to what petitioner told Ms. Soden and relevant to both the guilt and penalty phase of the trial. Nor has petitioner shown prejudice.

Petitioner next alleges that the trial counsel should have raised the trial court's error in prohibiting him from developing evidence on cross-examination. Like the prior claims, petitioner fails to show that the action taken by the trial judge constituted error, much less that the failure to raise this on appeal violated petitioner's constitutional rights.

The first such error was that the trial judge sustained an objection concerning Ms. Soden's prostitution work about whether she was paid a straight salary or a commission. (Tr. 430) Ample evidence of Ms. Soden's situation was introduced without the need to explore business details. Next, the court is faulted for sustaining an objection of a deputy sheriff who also knew petitioner as a work employee. (Tr. 571) The court sustained an objection as to whether petitioner gave anyone trouble. The question was irrelevant. Last, petitioner complains because the trial court foreclosed cross-examination as to whether the department intended to charge Ms. Soden with any crimes. (Tr. 568-72) While it might have been appropriate to see whether any promises had been made to her, under the circumstances of this

case, sustaining the objection was not error. Ms. Soden explained her involvement in knowing about the crime and in her prostitution. The foreclosure of further inquiry was not error, much less an error by counsel in not raising these matters on appeal.

Petitioner complains that counsel should have appealed the trial court's failure to hold a charge conference prior to the guilty phase instructions. Petitioner fails to show prejudice and, therefore, the claim is without merit. The same is true to the extent petitioner claims that counsel did not argue that petitioner's death sentence was disproportionate to others similarly situated or the product of passion, prejudice or arbitrary factors. The claim is also conclusory. Riley v. Lockhart, 726 F.2d 421. He complains that counsel failed to appeal the removal of jurors because of their general reservation to the death penalty. He fails to provide a record citation and the claim may be dismissed for that reason. Also, the record does not support such a claim. See also this Opinion p. 68, n.5. In conclusion, petitioner's request for relief on Claim VII should be denied.

Claim VIII - Instruction Involving Malice as Constituting Invalid Mandatory Presumption

Petitioner alleges that one part of the trial judge's instruction created an unconstitutionally mandatory presumption. He points to the instruction where the Court charged that, if the jury found beyond a reasonable doubt that petitioner killed his victim, the law implied that the killing was unlawful and was done with malice. (Tr. 739, 740) Petitioner alleges that a reasonable

juror could have interpreted the instruction as requiring a mandatory inference of malice.

Respondent retorts that this claim is barred by Teague v. Lane, 489 U.S. 288, since it relies on Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). However, Sandstrom was decided in 1979 and Francis on April 29, 1985. Both decisions, therefore, arose prior to May 20, 1985 when petitioner's conviction became final. Also, Francis has been said to simply be an application of Sandstrom. Yates v. Aiken, 484 U.S. 211, 216-17, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). Petitioner's claim does not seek to establish a new rule by his contention. Notwithstanding, petitioner's claim must be dismissed on the merits.

The actual language used by the state court did not create a mandatory presumption or inference. Instead, the language only indicated that when certain acts occurred there was an implication that certain facts were established. To imply is far different from presuming. United States v. Love, 767 F.2d 1052, 1059 (4th Cir. 1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 890 (1986)(to infer). In Rook v. Rice, 783 F.2d 401, 405 (4th Cir.), cert. denied, 478 U.S. 1022, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986), the court examined this same instruction and found that it passed constitutional muster. Moreover, in this case, unlike others, there is no question that petitioner did not act in the heat of passion or in self-defense. Therefore, if petitioner in

fact committed the act, and there is no serious dispute on that issue, then he did so deliberately and intentionally. Under these circumstances, there could be no error in the instruction.

Finally, and alternatively, in this case the brutality of the act and overwhelming evidence of guilt clearly established intent. Therefore, petitioner's failure to object to the instruction waived any error and also the failure to object to the instruction would be harmless. Waye v. Townley, 871 F.2d 18 (4th Cir. 1989), cert. denied, 491 U.S. 910, 109 S.Ct. 3202, 105 L.Ed.2d 710 (1989). To the extent petitioner would claim that his trial attorney committed error by failing to object to the instruction, this tact also fails for inability to show prejudice because of the overwhelming, clear evidence of guilt. Id.; Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991). Therefore, this claim for relief should be denied.

Claim IX - Death Penalty Statute Unconstitutional on its Face

Petitioner argues that the death penalty statute, N.C.G.S. § 15A-2000, et seq., is unconstitutional because there are no provisions to guide prosecutorial judgment on when to seek an indictment for first-degree murder or when to seek the death penalty in a particular case. The prosecutor testified that he had discretion in selecting his cases. (JS 6-10)

Petitioner fails to state a claim for relief. It is true that a prosecutor may not engage in selective prosecution where a person is singled out for bad faith motives, such as race, religion or the exercise of a constitutional right. United States v. Greenwood, 796 F.2d 49 (4th Cir. 1986). However, there is nothing which

indicates that petitioner's right was violated in this regard. Therefore, petitioner must and does argue that because the prosecutor could engage in discretionary selection of cases, this could result in discriminatory selection. On this basis he claims that the statute is unconstitutional. However, merely because the statute does not explicitly forbid the obvious, that does not mean it is unconstitutional.

Selecting cases for prosecution and selecting death penalty cases present the same problems of evaluating the strength of the case, whether the elements can be satisfied, and other case bound factors which will vary with each case. Such discretion does not, at present violate Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), by creating a substantial risk that the death penalty will be imposed arbitrarily or capriciously. Petitioner fails to show that the Supreme Court has found prosecutorial discretion leads to arbitrary or capricious imposition of the death penalty. Therefore, petitioner seeks to establish a new rule which he may not do in this petition for post-conviction relief. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

X - Denial of Motion for Change of Venue

Petitioner claims that the trial court's denial of his motion for a change of venue and special venire violated his right to due process of law. Petitioner cites the massive publicity in petitioner's case with newspaper headlines and television and radio

coverage. He attaches all of the newspaper clippings he feels are relevant.

Petitioner acknowledges that his trial and appellate counsel filed the appropriate pretrial motion but faults him for not renewing it after the jury was selected. Petitioner charges that the pretrial publicity in this community was massive and saturated it. He asserts that most of the jurors knew about the case prior to trial and some of them had formed opinions about the case. Petitioner claims that in this case prejudice must be presumed.

A review of the record fails to support petitioner's contention. The matter was thoroughly explored at the post-conviction hearing. The post-conviction court found trial counsel made an adequate investigation and presentation of the issue and did not appeal it due to its lack of merit. These findings are supported by the record, along with the decision that the denial of the change of venue motion did not violate petitioner's right to a fair trial. The trial court's finding of impartiality is one of historical fact and entitled to deference. Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984).

Counsel was an experienced attorney and state legislator. He knew his county well and conducted an investigation prior to trial. It is true that the victim and his family were well liked and there was strong feeling initially that someone should be punished. However, this feeling mellowed (PCHT 32). Notwithstanding, counsel decided to press the motion anyway to be sure. Id.

Counsel did not call an expert since he had tried many criminal cases in the county and was attuned to the feelings of the citizens. (PCHT 33) Counsel put in evidence of news media publicity. He did not put in evidence of word of mouth publicity because his own investigation showed there was not evidence to support that position. (PCHT 35-36) Counsel did not selectively call people who indicated petitioner could not get a fair trial since more people were indicating he could get a fair trial. (PCHT 41-42) Furthermore, counsel was satisfied with the jury that he got. Id. He felt this jury gave him the best chance of obtaining a fair trial. (PCHT 79-82) He understood he could have simply arbitrarily exercised peremptory challenges as now argued by petitioner, but chose not to employ such a course of action which would jeopardize the trial simply for the sake of making an unpromising appellate argument. Id.

In order to show that he was denied a fair trial and impartial jury because of adverse pretrial publicity, the petitioner has the burden of demonstrating actual identifiable prejudice attributable to the publicity on the part of a member or members of his jury at the time of trial. Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Hargrave v. Landon, 584 F. Supp. 302, 305 (E.D. Va.), aff'd, 751 F.2d 379 (4th Cir. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985); United States v. Wilson, 715 F.2d 1164, 1168 (7th Cir.), cert. denied, 464 U.S. 986, 104 S.Ct. 434, 78 L.Ed.2d 366 (1983). To meet this burden, petitioner must show, based on a totality of the circumstances, the

actual existence of an opinion eradicating the jurors' presumed impartiality. Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Hargrave v. Landon, 584 F. Supp. 302; United States v. Pomponio, 563 F.2d 659, 665 n.9 (4th Cir. 1977), cert. denied, 435 U.S. 942, 98 S.Ct. 1521, 55 L.Ed.2d 538 (1978)(presumed impartiality). Merely showing that the jurors were familiar with the allegedly prejudicial news articles cannot establish prejudice because it is not required that jurors be totally ignorant of the facts and issues involved. Irvin v. Dowd, 366 U.S. at 722; United States v. Wilson, 715 F.2d 1164.

Likewise, the mere existence of a pre-conceived notion as to the guilt or innocence of the accused, without more, is insufficient to rebut the presumption of impartiality. The law finds it sufficient if the juror can lay aside his notions or opinion and render a verdict based solely on the evidence at trial. Irvin v. Dowd, 366 U.S. at 723.

Applying the above principles to the facts of this case, petitioner fails to meet his burden of showing actual prejudice. His only citation is to two prospective jurors, Gary Kee and Faye Gaskey, who were employed as barbers and beauticians. They stated that people were expressing their opinions as to petitioner's guilt. Even combined with petitioner's allegations of fact, this does not show evidence of prejudice. See Petition at ¶ 201, p. 54. Petitioner notes that only one juror had not heard of the case prior to the trial. However, only seventeen had participated in conversations about the case and only twelve had heard that people

had asserted that petitioner had committed the crimes. Id. Only a "number" had formed opinions about the case. Id. Respondent points out that the defense only had to use seven out of its peremptory challenges. All jurors were able to affirm their impartiality. The trial court's rulings are entitled to a presumption of correctness. Patton v. Yount, 467 U.S. 1025. Petitioner fails to show actual prejudice or impartiality.

The exception to the approach of requiring a petitioner to show actual juror prejudice is where the pretrial publicity is so intense, prejudicial, inflammatory and pervasive that prejudicial juror bias may be presumed. Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Rideau v. Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Mayola v. Alabama, 623 F.2d 992, 996-97 (5th Cir. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981). While some courts appear to speculate that the petitioner need not show any of the jurors impaneled or the venire were actually exposed to the publicity, in practice, relief under this theory has rarely been granted.

Extensive knowledge of the crimes or putative criminal is not sufficient by itself to render a trial unfair. The petitioner must show a trial atmosphere utterly corrupted by press coverage. Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Mayola v. Alabama, 623 F.2d at 997. Comparing the news articles submitted by petitioner with the relevant case law, the

Court finds petitioner's argument that prejudice should be presumed is also without merit.

As a comparison, in the three foundation cases cited above in which the Supreme Court discussed publicity as being presumptively prejudicial, the publicity was shocking. In Rideau, the only pretrial publicity case, a twenty minute film of defendant's confession under police interrogation was broadcast three times by a local television station. In Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), a circus atmosphere developed which included the press being allowed to sit within the bar and to overrun it with television equipment. Finally, in Sheppard, there was a background of extremely inflammatory publicity, as well as the courthouse given over to accommodate the public's appetite for a carnival. See Murphy v. Florida, 421 U.S. at 798-99. None of these circumstances existed at the time of petitioner's trial.

While petitioner claims that the pretrial publicity was widespread, visible and prejudicial, the facts fail to reveal this to be the case. The publicity was initially heavy but petitioner's trial was six months later. While there were news articles and editorials, the articles were mostly factual in nature. Moreover the Daly Independent Newspaper, which serves the area, had Lisa Green's picture on the front page of the January 7, 1981 edition along with her claim of petitioner's innocence and alibi. (Tr. at 47) The newspaper and local news directors testified about substantial publicity but could not say that it would be difficult to get an impartial jury.

Petitioner fails to show that the news coverage so saturated and tainted the county that any subsequent proceeding necessarily would have been prejudicial. In addition to the articles being mainly factual, petitioner fails to point out evidence of grossly inflammatory coverage. The articles certainly criticized criminal acts, as they should, but strong and appropriate words are not evidence of inflammatory prejudice. Petitioner's counsel's investigation corroborates lack of inflammatory publicity, and corroborates a decision that there was neither presumed nor actual prejudicial pretrial publicity in this case. Petitioner's claim for relief in this count should be denied.

Claim XI - Petitioner's Absence at Critical Stages During the Trial

Petitioner contends that his constitutional right to be present at all critical stages of the trial was violated in four instances. On May 21, 1981 petitioner was apparently not brought into the trial until the argument and rulings were made on several pretrial motions. (JS 56) Prior to that, counsel argued and the court ruled on various motions. Counsel raised the question that the death penalty was facially invalid because of the discretion given to the prosecutor in selecting cases. The prosecutor testified that he indeed did exercise discretion. The motion was denied. Counsel requested that the jurors be sequestered prior to and after the jury selection which was granted. (JS 21-22) The court also denied restriction on public attendance at, and media coverage of, the trial. The judge permitted the consolidation of the cases against petitioner.

Petitioner also was initially not present on May 26, 1981 when the court instructed the jury venire, gave them their oath and apparently excused two jurors at his discretion. Third, petitioner was not present at bench conferences when two prospective jurors (Moose and Horton) were excused at the court's discretion. (JS 48-49, JS 55) This occurred outside of the hearing of petitioner and counsel because the excuses were personal or embarrassing.

Finally, petitioner alleges that the court communicated ex parte with a juror when the judge indicated to a juror that because of the recess prior to trial and the juror's schedule, the juror could call the judge's residence to ask questions about the scheduling of petitioner's trial. (JS 439-41) There is no evidence that the juror in fact called. Respondent also indicates that petitioner was not present during the change of venue hearing in March, 1981 at counsel's request in order to prevent the victim from viewing the petitioner for a long period of time in court. (Motion for Change of Venue Tr. at 6) Petitioner does not appear to challenge this, nor could he since counsel did this for strategic reasons. (PCHT 135-36)

Petitioner fails to show that he is entitled to relief. The exact scope of a defendant's right to be present at all proceedings connected with his criminal trial is not clear. Rule 43 of the Federal Rules of Criminal Procedure requires a defendant to be present at arraignment, time of plea and at every stage of the trial, including the impaneling of the jury and the return of the verdict and imposition of sentence, but not at a conference or

argument upon a question of law. It has been stated that this rule embodies rights at common law and not under the Constitution. 3A Wright, Federal Practice and Procedure § 721, p. 5 (1982). Thus, Rule 43 provides a broader scope of protection than that provided by the Constitution. United States v. Gregorio, 497 F.2d 1253, 1257-59 (4th Cir.), cert. denied, 419 U.S. 1024, 95 S.Ct. 501, 42 L.Ed.2d 298 (1974).

In United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), the Supreme Court discussed the two bases of constitutional protection concerning an accused's presence during criminal trial proceedings. It stated:

> The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., Illinois v. Allen, 397 U.S. 337 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In Snyder v. Massachusetts, 291 U.S. 97 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id., at 105-106, 108; see also Faretta v. California, 422 U.S. 806, 819 n.15 (1975). The Court also cautioned in Snyder that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U.S., at 115.

470 U.S. at 526.

The Supreme Court made clear that contact between the court and a juror in the absence of the defendant, as alleged by

petitioner in the instant case, does not violate a defendant's right to due process. The Supreme Court stated:

> We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the in camera discussion with the juror. "[T]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." Rushen v. Spain, 464 U.S. 114, 125-126 (1983) [Stevens, J., concurring in judgment].

470 U.S. at 526.

The remaining claims are petitioner's exclusion during motion argument and during the instruction and swearing in of the jury venire. In that regard, petitioner failed to make any objection as the Court found necessary in United States v. Gagnon, 470 U.S. at 528, 529. Even for a waiver of one's rights under Fed. R. Crim. P. 43, the defendant need not be explicitly advised of his right nor is any type of waiver on the record required. Rather, a total failure to assert one's rights is a sufficient waiver. Id.; see also Peretz v. U.S., ____ U.S. ____, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991).

In the instant case, petitioner has waived all of his claims pertaining to his absence by failing to make an objection on the record. In addition, he fails to show that his rights were violated. Petitioner makes a weak confrontation clause argument that he was not present during the testimony of the prosecutor. The prosecutor merely testified that under North Carolina law he

had discretion in charging individuals with first-degree murder and in seeking the death penalty. (JS 6-10) This type of hearing is even further removed from that of the competency hearing of two children which the Supreme Court found did not implicate a defendant's right to be present under the sixth amendment confrontation clause in Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). There, the questions at the competency hearing did not involve matters of guilt or innocence and in any event, could be repeated at trial. In the instant case, the questioning of the district attorney also did not implicate guilt or innocence, but rather a collateral matter not even connected with the evidence of the trial.

Petitioner fares no better under a due process analysis. Petitioner has to show that he was denied a fair or just hearing. His presence at a hearing is not guaranteed, especially when it would be useless or of doubtful benefit. 482 U.S. at 745. The motions and the swearing of the jury simply did not require petitioner's presence. He claims he lost the right to stare the jurors in the eye when they were put under oath. He alleges he was unable to defend himself because the court consolidated the charges in his absence. These assertions are feckless. U.S. v. Moore, 936 F.2d 1508, 1523 (7th Cir. 1991). His further argument that without an indication on the record of a knowing, intelligent and voluntary waiver, his absence constitutes per se constitutional error, has already been addressed and rejected. To the extent petitioner scores his counsel for failing to object to his absence, petitioner

likewise fails to show any cognizable prejudice. Therefore, petitioner's Claim XI should be dismissed.

Claim XII - Prosecutorial Misconduct

Petitioner claims he was denied his right to a fundamentally fair trial and sentencing hearing because of statements or arguments in the jury selection, during the trial and in the arguments to the jury. In order to succeed in these claims, petitioner faces a stiff burden. The issue is not whether the remarks were unfair, undesirable or universally condemned. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Rather, the issue is whether the prosecutor's actions or comments so infected the trial with unfairness that any resulting conviction necessarily denied due process. Id.

In making the review, the Court may look to see whether the prosecutor intentionally manipulated or misstated the evidence or in some way implicated another specific constitutional right. 477 U.S. at 182. The Court must look at the effect of the comments on the trial as a whole. When the weight of the evidence against petitioner is heavy, there is a reduced likelihood that the jury's decision could be influenced by the challenged actions. Id. The Court may also look to see whether defense counsel made tactical decisions or otherwise invited the prosecutor's actions. Id. The standard of review is a narrow one, directed solely to due process rights and a habeas corpus court may not engage in a broad exercise of its supervisory power. Id. at 181. The Court may also consider whether there was an objection or request to caution the jury.

United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988). With respect to actions, a prosecutor enjoys broad discretion. United States v. Gravely, 840 F.2d 1156 (4th Cir. 1988)(not misconduct to immunize some witnesses but not all).

Turning to the specific facts of the instant case, petitioner fails to show that he was denied a right to a fair trial by the prosecutor's remarks, actions or argument. First, petitioner argues that in the jury selection the prosecutor repeatedly attempted to denigrate the jurors' sense of responsibility. However, petitioner only cites one instance. The prosecutor, when questioning a juror, indicated that the juror was being asked to function under the law but, "[y]ou are not personally doing anything." (JS 67) This statement was made during the voir dire to Mrs. Klutz. Petitioner struck this juror. (JS 88) The other jurors were sequestered. This isolated remark as to a struck juror does not justify overturning petitioner's conviction.

Next, petitioner complains because the prosecutor asked jurors about their organizational and religious affiliations (JS 61) and whether they could recommend the death penalty without hesitation (JS 66). While the prosecutor did ask Mrs. Klutz about her affiliations and whether she could recommend the death penalty, she was stricken from the jury. The remainder of the allegation is conclusory. Petitioner states, "When unable to excuse these less gung-ho jurors for cause, they were peremptorily stricken." Without citation to the record, the claim may be dismissed on that

basis. O'Bremski v. Maass, 915 F.2d 418; Riley v. Lockhart, 726 F.2d 421. This claim is merely argumentative.

Petitioner asserts that in the guilt phase, the prosecution sought to manipulate the admission of irrelevant prejudicial testimony by encouraging witnesses to refer to petitioner as "Wild Man." (Tr. 507) Prior to that time, the witnesses had referred to petitioner as Wild Man because that was his nickname. With this particular witness, the prosecutor merely asked the witness if petitioner had any nicknames and the witness responded. The question was not irrelevant since it served to identify petitioner and tie him in with the testimony of the other witnesses who testified.

Petitioner alleges that the prosecutor failed to disclose promises made to Phyllis Soden in exchange for her testimony against petitioner. He bases the claim on the fact that Ms. Soden admitted to the commission of at least three uncharged criminal acts during her testimony and admitted that she had not been prosecuted for them. Petitioner fails to provide citation to the record with respect to those facts as ordered. Therefore, the allegations are conclusory. Riley v. Lockhart, 726 F.2d 421. More importantly, petitioner fails to show there were in fact promises. Petitioner may be referring to the testimony discussed in Claim VII-E about Ms. Soden's prostitution activity and petitioner's trying to make her an accessory after the fact. These are not the sort of matters where one would expect promises and petitioner fails to show any.

The remainder of petitioner's claims allege prosecutorial misconduct during arguments to the jury. The Court has already discussed and rejected these issues in the discussion of Claim VII.

Petitioner complains about the prosecutor calling the victim's house a "crucifixion block" and indicating it sickened him that a defendant was tried in a beautiful courtroom while victims are shot down to lay in their own blood and vomit. (Tr. 981) He alleges that the prosecutor urged conviction in order to do something about crime. (Tr. 989) The prosecutor also indicated that while petitioner was advised of his rights with respect to a search and seizure, that the Shinns also had a right to be free from assault (Tr. 1017) and that while defendant has two attorneys, the deceased victim did not have an attorney when he was at the mercy of petitioner (Tr. 1018). These last comments were made during the penalty phase of the trial. While the comment about the "attorney" tends to tangentially implicate petitioner's constitutional rights, neither it nor the other comments are sufficiently egregious so as to vitiate the trial as previously discussed. The evidence against petitioner was extremely strong, the remarks were isolated and did not ask the jury to make any specific adverse prejudicial inference against the petitioner. That is, the remarks were general in nature.

Next, petitioner claims that the prosecutor argued during the jury selection that the killing was heinous and this was not an aggravating circumstance under the statute. (JS 1013) The remark was not improper. It did not suggest an additional basis for which

the jury could sentence petitioner to death. Rather, the comment merely indicated that the actions by petitioner were particularly loathsome, as the evidence indicated.

Finally, petitioner alleges that the prosecutor reminded the jurors to remember their promise to sentence to death in an appropriate case and that this was improper. Petitioner fails to provide a citation for this allegation as ordered by the Court and, therefore, it may be dismissed as conclusory. It would appear that petitioner may be referring to the reference found at JS 1022. There, the prosecutor reminded the jurors that they all agreed that they believed in the death penalty and also that the jurors did not believe that the death penalty should be imposed in all cases, but when asked if murder in the first degree was one case when it should be imposed, they said yes. He then stated,

> I'm not going to back you in that corner. I will say this to you, under the circumstances of this case, . . . if that is not sufficient to put that man to death under the law, let's throw the death penalty out and say the State of North Carolina has no death penalty.

(Tr. at 1022) The remark, if initially improper was corrected by the prosecutor and in all events, cannot be said to be constitutionally improper.

XII(2)[6] - Petitioner Precluded from Presenting Mitigating Evidence

This claim was discussed in reference to petitioner's ineffective assistance of counsel claim. It is without merit.

[6]Petitioner erred in marking out his claims in the petition and used two Roman Numeral XII's.

Petitioner attempted to establish his good character through the state's witness, Mr. Tucker. The court sustained an objection. The trial court did not commit error in excluding such evidence at the guilt phase of the trial and sustaining the objection did not preclude petitioner from presenting mitigating evidence.

XIII - Jury Instruction Sheet Violated Petitioner's Eighth Amendment Right

Petitioner alleges that the instructions and jury instruction sheet prevented the jurors from "giving independent mitigating weight to aspects of defendant's character and record and to circumstances of the offense proffered in mitigation." He cites Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Petitioner argues that the trial court erred by instructing the jury that if it unanimously found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, then it would be their duty to recommend that petitioner be sentenced to death. (Tr. 783-84) Such language is not impermissibly mandatory. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). To the extent petitioner argues otherwise, he is seeking to establish a new rule of law and is prohibited from doing so by Teague v. Lane, 489 U.S. 288. Petitioner has not contested a Teague dismissal in his response.

XIV - Exclusion of Jurors for Cause Based on their Beliefs About the Death Penalty

Petitioner alleges that jurors Elaine Auten, Barbara Littles and Glen Medlin were improperly stricken from his jury. He admits that the voir dire examination of these jurors was somewhat confused. Defense counsel objected to the court's discharging them for cause.

The Fourth Circuit has recently reviewed a similar type challenge in Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991). There, the court set out the standard of review employed by a federal habeas corpus court. It stated,

> [A] venireman can be excused if his views on the death penalty "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright, 469 U.S. at 424, 105 S.Ct. at 852. The Court has held that the question of juror bias is to be resolved by the trial judge's assessment of demeanor and credibility, and that such assessments are to be accorded a presumption of correctness under 28 U.S.C. § 2254(d). 469 U.S. at 426-29, 105 S.Ct. at 853-54. Moreover, it has been established in this court that where the prospective juror's response, as captured in the transcripts, reflects some ambiguity in the state of mind of the juror, then the determination made by the trial court, based on its eyeing the juror, is presumed to be consistent with the applicable standard. See Briley v. Bass, 750 F.2d 1238, 1246-47 (4th Cir. 1984)(where venireman's responses were part equivocal and part in opposition to death penalty, federal habeas court reasonably may rely on trial court's discretion to determine which response accurately reflects venireman's state of mind).

Id. at 415.

The Court will first examine Ms. Auten's testimony. (JS 197-207) The the entire colloquy between the prosecutor and Ms. Auten will not be set out. However, she emphatically stated that based on her feelings she just did not believe in capital punishment. (JS 201) The thought of it was offensive to her. (JS 202) There was a point where it appeared that she indicated that she might bring back a verdict of guilty even though she knew this would result in the defendant being put to death. (Tr. 202) On further clarification, she indicated she really did not know if she could vote that way and that the entire subject was making her nervous. (Tr. 202-03) Thereafter she stated she did not feel the courts or anyone else had a right to take human life and that she just would not take anyone's life. (Tr. 203) She then stated that she was opposed to the death penalty but she didn't know because if she heard the case she might change her mind, she just didn't know. (Tr. 204) She indicated that it was not likely that she could vote for the death sentence. She could not think of any circumstances in which she would vote for it. (Tr. 204) She finally ended up saying she could not vote for the death penalty. (Tr. 206)

Contrary to petitioner's claims, striking Ms. Auten for cause did not violate petitioner's constitutional rights. Here, her responses cannot be termed equivocal, but to the extent they were, the trial judge's determination may be presumed to be correct Id.

Next, petitioner challenges the striking of juror Barbara Littles. (JS 471-81) Ms. Littles' first response, to whether the death penalty would be proper, was yes. (JS 477-78) However, the

prosecutor then asked whether she could return to the courtroom and look at the defendant and say, "Mr. Lawson, I think you should die." (JS 478) After that, she stated no, she could not do that based on her religious beliefs. She was asked if there might be some circumstances which she could render a verdict of death. She indicated that there might be if she examined herself. (JS 478-79) The prosecutor asked for clarification and she indicated that she could not bring back a death verdict knowing the consequence and could not think of any circumstances where she could. (JS 479) She then stated she did not know whether she believed in the death penalty but she did know she could not return a verdict where a person would be sentenced to die. She also stated she would automatically vote against the death penalty if she were on the jury. (JS 479-80) She then repeated her position several times. (JS 480) When the prosecutor moved to excuse her for cause, the court conducted its own examination and found that Ms. Littles would not be able to vote for the death penalty and excused her.

In Ms. Littles' case, there was some initial indication that she could vote for the death penalty. However, after more probing inquiry, she definitely indicated she would not vote for the death penalty under any circumstances. The court independently examined her. To the extent there is any ambiguity, this Court may presume the trial judge's assessment of demeanor and credibility are correct. There was no error in striking Ms. Littles.

Last, petitioner complains about the striking of juror Medlin. (JS 589-97) He immediately stated that after giving the matter

considerable thought, he was not sure that he could be part of the process which caused someone to lose their life. (JS 593) He indicated he could not vote for the death penalty because of the inequality of the punishment. (JS 594) He did not waiver from this position. For reasons previously stated, there is no error in striking Mr. Medlin from the jury.

XV - Black Persons Unconstitutionally Excluded from the Jury

Petitioner claims that black persons were unconstitutionally and intentionally excluded from the jury. This claim involves the excusing of Barbara Littles from the jury because she could not vote for the death penalty. The basis for the claim is the following colloquy:

Mr. Roberts: [The prosecutor] Now, traditionally, and you know this as well as I know it, the black community is opposed to the death penalty because years ago it seemed like only the black people were the ones that were put to death. Now, you are aware of that, aren't you?

Ms. Littles: Yes, sir.

Mr. Roberts: And have you ever discussed that aspect of the death penalty with the people in your community?

Ms. Littles: No, sir.

(JS 478-477) This colloquy arose after Ms. Littles indicated that she did not know if she were personally opposed to the death penalty because she had not given it much thought. The state,

therefore, reminded her that the matter was important because it would be a waste of time to permit a juror to sit who could not under any circumstance render a verdict that the defendant be sentenced to death. (JS 476) After the colloquy quoted above, the prosecutor continued asking her questions. Ms. Littles' responses were equivocal, but eventually he said she could not vote for the death penalty and the trial judge independently corroborated this, as was discussed in Claim XIV.

Petitioner claims Ms. Littles was excused solely on account of her race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The claim must be dismissed for several reasons.

Since petitioner is not black, he would apparently rely on Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), which held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race based exclusion of persons from a petit jury. The claim in this case is barred because petitioner would be seeking to apply a new rule of law in this case and is barred by Teague v. Lane, 489 U.S. 288. Petitioner has not contested this ground for dismissal in his response.

In addition, it is clear that Ms. Littles was stricken not because of her race, but because of her inability to vote for a death penalty. Significantly, in this case, the judge himself examined Ms. Littles before granting the motion to excuse her. It is clear from the record that the prosecutor was solely concerned

with Ms. Littles' statements about the death penalty. The claim is without merit.

Conclusion

In conclusion, it is found that all of petitioner's claims may be denied without an evidentiary hearing. The record before the Court establishes that petitioner is not entitled to relief and, therefore, the petition should be denied and dismissed.

IT IS THEREFORE ORDERED that petitioner's motions for discovery and the appointment of a psychiatric expert, Dr. Billy Royal, are denied.

IT IS RECOMMENDED that respondent's motions to dismiss the petition on the grounds that petitioner has added a new, unexhausted claim as to his mental competency claim and to amend his answer to raise the exhaustion defense, and his motion to partially dismiss the petition on the ground that petitioner has procedurally defaulted certain claims, be denied.

IT IS FURTHER RECOMMENDED that respondent's motion to dismiss the petition be granted, petitioner's motion for an evidentiary hearing be denied, and that the petition be dismissed.

Russell A. Eliason
United States Magistrate Judge

November 19, 1991